No. 14-5297

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VALERIA TANCO, et al.,
Plaintiffs-Appellees,

v.

WILLIAM EDWARD "BILL" HASLAM, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Tennessee, No. 3:13-cv-01159 (The Honorable Aleta A. Trauger)

BRIEF OF PLAINTIFFS-APPELLEES

Abby R. Rubenfeld
RUBENFELD LAW OFFICE, PC
2409 Hillsboro Road, Suite 200
Nashville, Tennessee 37212
Email: arubenfeld@rubenfeldlaw.com
Tel.: 615-386-9077; Fax: 615-386-3897

Maureen T. Holland
HOLLAND AND ASSOCIATES, PLLC
1429 Madison Avenue
Memphis, Tennessee 38104-6314
Email: mtholland@aol.com
Tel.: 901-278-8120; Fax: 901-278-8125

Regina M. Lambert
7010 Stone Mill Drive
Knoxville, Tennessee 37919
Email: lambertregina@yahoo.com
Tel.: 865-679-3483; Fax: 865-558-8166

William L. Harbison
Phillip F. Cramer
J. Scott Hickman
John L. Farringer
SHERRARD & ROE, PLC
150 3rd Avenue South, Suite 1100
Nashville, Tennessee 37201
Email: bharbison@sherrardroe.com
Tel. 615-742-4200; Fax: 615-742-4539

Shannon P. Minter
Christopher F. Stoll
Amy Whelan
Asaf Orr
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102
Email: sminter@nclrights.org
Tel.: 415-392-6257; Fax: 415-392-8442

Attorneys for Plaintiffs-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, Plaintiffs-Appellees offer the following disclosures:

Plaintiffs-Appellees Valeria Tanco, Sophy Jesty, Ijpe DeKoe, Thomas Kostura, Matthew Mansell, and Johno Espejo, are all individuals; none is a corporation or a subsidiary or affiliate of a publicly-owned corporation.

No publicly-traded corporation has a financial interest in the outcome of this appeal.

DATED: June 9, 2014 /s/ *William L. Harbison*

Attorney for Plaintiffs-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES SUPREME COURT CASES

SIXTH CIRCUIT CASES

OTHER CASES

BRIEFS

STATUTES

TREATISES/LR ARTICLES

STATEMENT REGARDING ORAL ARGUMENT

The matter presented for review involves constitutional issues of exceptional importance. The challenged laws impose severe and ongoing harms on Tennessee's same-sex couples and their families. Plaintiffs-Appellees believe the case warrants oral argument.

ISSUES PRESENTED FOR REVIEW

The challenged Tennessee laws include a state statute and an amendment to the Tennessee Constitution (referred to herein as the "anti-recognition laws"), each of which prohibits recognition of legal marriages validly entered into by same-sex couples in other states. *See* Tenn. Const. art. XI, § 18; Tenn. Code Ann. § 36-3-113. The issues presented for review are:

1. Whether Tennessee's anti-recognition laws violate Plaintiffs' right to due process under the Fourteenth Amendment by depriving them of their constitutionally-protected liberty interests in their existing marriages and burdening their exercise of the freedom to marry.
2. Whether Tennessee's anti-recognition laws violate Plaintiffs' right to equal protection of the laws under the Fourteenth Amendment by excluding all legally married same-sex couples from the protections and obligations of marriage on the basis of their sexual orientation and gender in order to treat same-sex couples and their children unequally.
3. Whether Tennessee's anti-recognition laws impermissibly burden Plaintiffs' constitutionally protected right to interstate travel.
4. Whether the District Court appropriately granted injunctive relief in this action.

5. Whether this Court should undertake plenary review of this case and remand with instructions for the District Court to enter final judgment and a permanent injunction in Plaintiffs' favor, given that this appeal concerns the purely legal question of whether Tennessee's anti-recognition laws facially violate constitutional protections including the Fourteenth Amendment's guarantees of equal protection and due process and the fundamental right to travel.

INTRODUCTION

Plaintiffs in this action are three married same-sex couples: Valeria Tanco and Sophy Jesty; Ijpe DeKoe and Thomas Kostura; and Matthew Mansell and Johno Espejo. Like thousands of other couples in Tennessee, they married in other states before making Tennessee their home. As the Supreme Court recently affirmed, Plaintiffs' lawful marriages share "equal dignity" with other couples' marriages and warrant the same protections the federal Constitution ensures for all other married couples. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

No opposite-sex couple who moved to Tennessee after living and marrying elsewhere would dream their marriage would be invalidated and treated as though it never existed simply because career or family circumstances led them to make their home in a new state. Tennessee law, however, does exactly that, solely because Plaintiffs are married to spouses of the same sex. In so doing, Tennessee "interfere[s] with the equal dignity" of Plaintiffs' marriages and the marriages of other same-sex couples living in Tennessee. *Id*.

Tennessee's anti-recognition laws require the state and its officers to treat the marriages of Plaintiffs and other same-sex couples as nullities, denying them all of the protections, benefits, obligations, and security that Tennessee readily provides for other couples who validly married in other states. No matter how deeply they care for one another or how long they have stood by one another,

Tennessee treats Plaintiffs and other married same-sex couples as legal strangers to one another. It communicates to them and to all the world that their relationships are not as real, valuable, or worthy as those of opposite-sex couples; that they are worthy of no recognition at all; and that they are not, and never can be, true families. Like the federal law struck down in *Windsor*, the anti-recognition laws' "avowed purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples and their families. *Id*. at 2681.

For Plaintiffs, the price of moving to Tennessee was severe: deprivation of their status as married couples and as family members under state law. The federal Constitution, however, permits no such price to be imposed on Plaintiffs or other same-sex couples who move to Tennessee after marrying elsewhere. "A State cannot so deem a class of [families] a stranger to its laws." *Romer v. Evans*, 517 U.S. 620, 635 (1996).

STATEMENT OF THE CASE

A. The Plaintiffs

Each of the Plaintiff couples entered into a valid marriage under the laws of other states before moving to Tennessee. Their circumstances are representative of the many personal and career situations in which families regularly find themselves, and which, in our mobile society, may cause married couples to relocate to a new state.

Plaintiffs Dr. Valeria Tanco and Dr. Sophy Jesty married in New York and subsequently moved to Knoxville, Tennessee, where both spouses had accepted teaching positions at the University of Tennessee College of Veterinary Medicine. (Declaration of Valeria Tanco in Support of Plaintiffs' Motion for Preliminary Injunction ("Tanco Decl."), Dkt. 32-1, Page ID #387-88; Declaration of Sophy Jesty in Support of Plaintiffs' Motion for Preliminary Injunction ("Jesty Decl."), Dkt. 32-2, Page ID #395-96.) Plaintiffs Army Reserve Sergeant First Class Ijpe DeKoe and Thomas Kostura married in New York while Mr. Kostura was residing in New York and Sgt. DeKoe was stationed at Fort Dix in New Jersey, preparing to be deployed to Afghanistan. (Declaration of Ijpe DeKoe in Support of Plaintiffs' Motion for Preliminary Injunction ("DeKoe Decl."), Dkt. 32-8, Page ID #452; Declaration of Thomas Kostura in Support of Plaintiffs' Motion for Preliminary Injunction ("Kostura Decl."), Dkt. 32-9, Page ID #457.) Following Sgt. DeKoe's return from Afghanistan, the couple moved to Memphis, Tennessee, where Sgt. DeKoe is now stationed. (DeKoe Decl., Page ID #452-53; Kostura Decl., Page ID #457-58.) Plaintiffs Matthew Mansell and Johno Espejo married in California while residing there, and moved with their children to Tennessee, when Mr. Mansell's employer, a large international law firm, transferred many of its administrative operations, including Mr. Mansell's position, from California to Nashville. (Declaration of Johno Espejo in Support of Plainitffs' Motion for

Preliminary Injunction ("Espejo Decl."), Dkt. 32-15, Page ID # 482; Declaration of Matthew Mansell in Support of Plaintiffs' Motion for Preliminary Injunction ("Mansell Decl."), Dkt. 32-16, Page ID #487.)

Before moving to Tennessee, each couple's marriage was respected by their states of residence on an equal basis with all other marriages. In addition, since the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), their marriages have been recognized for most purposes by the federal government, including by Sgt. DeKoe's employer, the Army Reserves. Because of Tennessee's constitutional and statutory prohibitions on state recognition of marriages of same-sex couples, however, Defendants treat Plaintiffs' legal marriages as though they do not exist. (Tanco Decl., Page ID #388; Jesty Decl., Page ID #396; DeKoe Decl.; Page ID #453; Kostura Decl., Page ID #458; Espejo Decl., Page ID #483; Mansell Decl., Page ID #488.)

All of the Plaintiff couples have found themselves warmly welcomed by many Tennesseans, including their neighbors, colleagues, and employers. (*Id.*) But the State of Tennessee's refusal to respect their marriages strips them of a highly-protected legal status, disrupts the expectations and plans they have made in reliance on being married, denies them all of the many legal protections, obligations, and benefits available to other married couples under Tennessee law, and jeopardizes their eligibility for some important federal protections, including

Social Security benefits.[1] (*Id.*) In order to create even a small measure of protection for their families and marginally reduce the legal uncertainty created by Tennessee's refusal to respect their marriages, the Plaintiff couples are required to take costly steps to prepare powers of attorney, wills, and other documents; however, such steps provide only a tiny fraction of the comprehensive protections and mutual obligations Tennessee law automatically grants to married opposite-sex couples. (Tanco Decl., Page ID #389; Jesty Decl., Page ID #397; DeKoe Decl.; Page ID #453-54; Kostura Decl., Page ID #458; Espejo Decl., Page ID #483-84; Mansell Decl., Page ID #488-89.)

For example, Dr. Tanco and Dr. Jesty had a child in the spring of 2014. (Tanco Decl., Page ID #390; Jesty Decl., Page ID #398.) As the birth mother, Dr. Tanco was recognized as the child's legal parent. But had the District Court not enjoined Defendants from enforcing the anti-recognition law, Dr. Jesty would not have been recognized as a legal parent of her child, because she would not have been subject to the statutory presumption that both spouses are the legal parents of

[1] The Social Security Administration recognizes the marriages of same-sex couples for purposes of benefits under the Social Security Act, provided that the couple resides in a state that respects the marriages of same-sex couples. Program Operations Manual System, GN 00210.100, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210100. The Administration currently is holding spousal benefits claims filed by married same-sex couples living in states that do not respect their marriages and has not announced whether those benefits will be available to such couples. Program Operations Manual System, GN 00210.005, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210005.

a child born during a marriage. *See* Tenn. Code Ann. § 36-2-304. Tennessee's anti-recognition laws also deprive the couple of other important family protections. In preparation for their child's arrival, Dr. Tanco and Dr. Jesty attempted to enroll on a single health insurance plan that would cover their entire family. (Tanco Decl., Page ID #391; Jesty Decl., Page ID #399.) But their request for enrollment on a family plan as a married couple was denied because their employer is a state entity and participates in the State of Tennessee's group health insurance plan, and the state does not recognize the validity of their marriage. (*Id*.)

Beyond the many legal protections that are denied to the Plaintiff couples, the refusal by Tennessee and its officials to recognize their legal marriages continually communicates to Plaintiffs and other Tennesseans that the state regards Plaintiffs and their families as second-class citizens whose marriages are to be disregarded by every state official they may encounter. (Tanco Decl., Page ID #389; Jesty Decl., Page ID #397; DeKoe Decl.; Page ID #454; Kostura Decl., Page ID #459; Espejo Decl., Page ID #484; Mansell Decl., Page ID #489.) Mr. Mansell and Mr. Espejo are concerned that their young children will internalize these messages and begin to believe that their family is inferior and not entitled to the same dignity as other Tennessee families. (Espejo Decl., Page ID #485; Mansell Decl., Page ID #490.) Dr. Tanco and Dr. Jesty also want to protect their newborn child from growing up under discriminatory laws that mark their family as

different and less worthy than others. (Tanco Decl., Page ID #392; Jesty Decl., Page ID #401.) All of the Plaintiff couples wish to be treated as equal, respected, and participating members of society. (Tanco Decl., Page ID #387; Jesty Decl., Page ID #395; DeKoe Decl.; Page ID #452, 455; Kostura Decl., Page ID #457. 459; Espejo Decl., Page ID #482; Mansell Decl., Page ID #487.)

B. Procedural History

Because of the severe and irreparable harms caused by Tennessee's anti-recognition laws, Plaintiffs moved the District Court for a preliminary injunction barring enforcement of the laws against them. (Motion for Preliminary Injunction, Dkt. 29, Page ID #114; Memorandum in Support of Motion for Preliminary Injunction, Dkt. 30; Page ID #118.) On March 14, 2014, the District Court granted Plaintiffs' motion. (Memorandum Opinion, Dkt. 67, Page ID # 1415; Order, Dkt. 68, Page ID # 1435; Preliminary Injunction, Dkt. 69, Page ID # 1436.) The Court concluded that Plaintiffs are likely to succeed on the merits of their constitutional claims based in part on the many "thorough and well-reasoned cases" decided by various federal district courts in the months since *Windsor,* each of which held that state-law restrictions on marriage for same-sex couples "violate the Equal Protection Clause and/or the Due Process Clause, even under 'rational basis' review." *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 WL 997525, *5 (M.D. Tenn. Mar. 14, 2014). Specifically, the court noted:

> [D]efendants offer arguments that other federal courts have already considered and have consistently rejected, such as the argument that notions of federalism permit Tennessee to discriminate against same-sex marriages consummated in other states, that *Windsor* does not bind the states the same way that it binds the federal government, and that Anti–Recognition Laws have a rational basis because they further a state's interest in procreation, which is essentially the only "rational basis" advanced by the defendants here.

Id. Because it concurred with the decisions rejecting defendants' argument and concluded that the anti-recognition laws likely violate equal protection, the District Court did not reach Plaintiffs additional arguments that the law violates due process and deprives Plaintiffs of their constitutionally-protected right to interstate travel.

The District Court also concluded that the remaining considerations governing the issuance of preliminary injunctions supported enjoining enforcement of the anti-recognition laws as to Plaintiffs. The court found that Plaintiffs were likely to suffer irreparable harm in the absence of an injunction, observing that Tennessee's refusal to respect their marriages "de-legitimizes [Plaintiffs'] relationships, degrades them in their interactions with the state, causes them to suffer public indignity, and invites public and private discrimination and stigmatization." *Id.* at *7. The court further found that "the administrative burden on Tennessee from preliminarily recognizing the marriages of the three couples in this case would be negligible" and "that issuing an injunction would serve the public interest because the Anti–Recognition Laws are likely unconstitutional." *Id.*

at *8. Defendants appealed the District Court's order granting the preliminary injunction.

SUMMARY OF ARGUMENT

Tennessee's anti-recognition laws are unprecedented enactments that create an exception to Tennessee's long-standing rule that "'a marriage valid where celebrated is valid everywhere.'" *Farnham v. Farnham*, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009) (quoting *Pennegar v. State*, 10 S.W. 305, 306 (Tenn. 1889)). Tennessee has created this unique exception for married same-sex couples not to achieve any important, or even legitimate, government objective, but simply to discriminate against married same-sex couples and subject their valid marriages to unequal treatment. In *Windsor*, the Supreme Court held that Section 3 of the federal Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), required "careful consideration" under the Constitution's due process and equal protection guarantees because it represented an "unusual deviation" from long-standing federal practice by categorically denying recognition to the lawful marriages of same-sex couples. 133 S. Ct. at 2693. The Supreme Court held that Section 3 could not survive this inquiry because "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal," *id.* at 2694, and "no legitimate purpose overcomes the purpose and effect to disparage and to injure" married same-sex couples. *Id.* at 2696.

Like Section 3 of DOMA, Tennessee's anti-recognition laws starkly depart from past practice and law—not for a legitimate purpose, but in order to treat same-sex spouses unequally by excluding them from the protections afforded to other married persons. The anti-recognition laws create an exception to the longstanding rule that, like every other state, Tennessee generally respects valid marriages from other states even if the marriage would not have been permitted in Tennessee. And like Section 3 of DOMA, that deliberate imposition of inequality on a subset of married couples violates "basic due process and equal protection principles." *Windsor*, 133 S. Ct. at 2693.

The anti-recognition laws violate due process by effectively stripping Plaintiffs' of their marital status, depriving them of the fundamental right to privacy and respect for their legal marriages and penalizing them for having exercised the fundamental freedom to marry the person of their choice. For similar reasons, the challenged laws violate equal protection by penalizing legally married same-sex couples—the same class targeted by the federal law struck down in *Windsor*—not to further a legitimate goal, but to express disapproval of that class. On their face, the anti-recognition laws discriminate based on sexual orientation and gender in order to disadvantage gay and lesbian persons. As the Supreme Court held in *Romer v. Evans*, "laws singling out a certain class of citizens for disfavored legal status or general hardships are rare," and such measures violate

the requirement of equal protection in the most basic way. *Romer*, 517 U.S. at 633 (1996).

The anti-recognition laws also violate the "virtually unconditional personal right, guaranteed by the Constitution to us all," *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (internal quotation marks omitted), to "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Id.* at 499 (internal quotation marks omitted). Tennessee impermissibly has conditioned Plaintiffs' ability to accept a job transfer, pursue a new career opportunity, or even be stationed in Tennessee as a member of the Armed Forces on giving up all the state-law protections, benefits, and responsibilities of their existing marriages and being relegated to the status of legal strangers to one another. In effect, Tennessee requires married same-sex couples to sacrifice their marriages in order to live or even travel within its borders. Such a severe penalty on the right to interstate travel cannot stand.

In our federal system, in which interstate travel is ordinary, expected, and constitutionally protected, each state's power to marry couples within its borders is enhanced by the confidence that its conferral of marital status on couples will be respected by other states. A state's categorical exclusion of an entire class of

marriages from other states without adequate justification is an affront to our nation's federalism of a sort that has been rare in our constitutional tradition.

The Supreme Court has emphasized that federalism does not just safeguard the interests of the states and the federal government. Properly understood, "[f]ederalism [also] secures the freedom of the individual." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Id.* Tennessee's authority over the law of domestic relations does not include the authority to disregard Plaintiffs' marital status, which a sister state validly conferred and which the Fourteenth Amendment protects against unjustified deprivation by other states. "The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects." *Hall v. Florida,* 134 S.Ct. 1986, at *15 (2014).

STANDARD OF REVIEW

This Court ordinarily reviews a district court's grant of a preliminary injunction for an abuse of discretion. *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004). While the ultimate decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion, the Court reviews the district court's legal conclusions *de novo* and its factual findings for clear error. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635

F.3d 219, 233 (6th Cir. 2011). "This standard of review is 'highly deferential' to the district court's decision." *Id.* (quoting *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 540-41 (6th Cir. 2007)). "The injunction will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Mascio v. Pub. Emps. Ret. Sys. of Ohio*, 160 F.3d 310, 312 (6th Cir. 1998); *see also Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012).

In addition, in some circumstances, it is appropriate for this Court to undertake plenary review of a case even though the order appealed from is one granting or denying a preliminary injunction. When "a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986). As this Court has held:

> It is elementary that an appeal from the denial of injunctive relief brings the whole record before the appellate court and that the "scope of review may extend further [than the immediate question on which the District Court ruled] to allow disposition of all matters appropriately raised by the record, *including entry of final judgment*."

United States v. State of Michigan, 940 F.2d 143, 151-52 (6th Cir. 1991) (alterations in original and emphasis added) (citations omitted).

This is such a case. This appeal concerns the purely legal question of whether Tennessee's laws prohibiting the state from recognizing the valid marriages of same-sex couples who married in other states facially violate constitutional protections including the Fourteenth Amendment's guarantees of equal protection and due process. If they do, Plaintiffs are entitled "not only to a preliminary injunction, but a permanent one." *Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 171 F.3d 1052, 1060 (6th Cir. 1999), *overruled on other grounds by Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 157 (2003). Plaintiffs respectfully request that the Court undertake plenary review and remand with instructions for the District Court to enter final judgment declaring that Tennessee's anti-recognition laws violate the United States Constitution and a permanent injunction barring enforcement of those laws.

ARGUMENT

I. LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). When, as here, "a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits

often will be the determinative factor.'" *Obama for Am.*, 697 F.3d at 436 (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). All four of the relevant factors support the District Court's issuance of an injunction in this case. Indeed, the record demonstrates that Plaintiffs are entitled to final judgment and a permanent injunction prohibiting enforcement of Tennessee's anti-recognition laws.

II. TENNESSEE'S ANTI-RECOGNITION LAWS VIOLATE MULTIPLE GUARANTEES OF THE UNITED STATES CONSTITUTION.

A. Tennessee's Anti-Recognition Laws Create A Highly Unusual Categorical Exception To Tennessee's General Rule That The State Will Recognize Valid Marriages From Other States.

Tennessee's anti-recognition laws represent a stark departure from the state's longstanding practice of recognizing valid marriages from other states even if such marriages could not have been entered into within Tennessee. Tennessee has long applied the rule that "a marriage valid where celebrated is valid everywhere." *Farnham*, 323 S.W.3d at 134 (quoting *Pennegar*, 10 S.W. at 306). This rule—known as the "place of celebration rule"—is recognized in every state and is a defining element of our federal system and of American family law.

"[T]he concept that a marriage that has legal force where it was celebrated also has legal force throughout the country has been a longstanding general rule in every state." *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 978 (S.D. Ohio 2013). Indeed, the "policy of the civilized world[] is to sustain marriages, not to upset

them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949); *see also In re Lenherr's Estate*, 314 A.2d 255, 258 (Pa. 1974) ("In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere.").

The place of celebration rule recognizes that individuals order their lives based on their marital status and "need to know reliably and certainly, and at once, whether they are married or not." Luther L. McDougal III *et al.*, *American Conflicts Law* 713 (5th ed. 2001). This rule of marriage recognition also "confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state." William M. Richman & William L. Reynolds, *Understanding Conflict of Laws* 398 (3d ed. 2002). The doctrine comports with the reasonable expectations of married couples that, in our highly mobile society, they may travel throughout the country secure in the knowledge that their marriage will be respected in every state and that the simple act of crossing a state line will not divest them of their marital status. *See Obergefell*, 962 F. Supp. 2d at 979 ("Couples moving from state to state have an expectation that their marriage and, more concretely, the property interests

involved with it—including bank accounts, inheritance rights, property, and other rights and benefits associated with marriage—will follow them.").

For well over a century, Tennessee courts have held that marriages validly entered into in other jurisdictions will be honored in Tennessee even if the couple could not have married in Tennessee. For example, Tennessee has recognized: (1) common-law marriages entered into in another state and valid under the law of that state, even though common-law marriages are not recognized if entered into in Tennessee, *Shelby Cnty. v. Williams*, 510 S.W.2d 73, 74 (Tenn. 1974); *In re Estate of Glover*, 882 S.W.2d 789, 789-90 (Tenn Ct. App. 1994); *Lightsey v. Lightsey*, 407 S.W.2d 684, 690 (Tenn. Ct. App. 1966); (2) marriages validly entered into in another state by parties who do not satisfy the minimum age requirements to marry under Tennessee law, *Keith v. Pack*, 187 S.W.2d 618, 619 (Tenn. 1945); and (3) marriages that would have been deemed valid in the state where entered based on the doctrine of marriage by estoppel, even though Tennessee does not recognize that doctrine and the marriage would have been void and contrary to public policy if entered into in Tennessee, *Farnham*, 323 S.W.3d at 140.

The sole exception to this established rule has been for marriages that violate such strong principles of Tennessee public policy, designed to protect vulnerable spouses, that the parties to the relationship would be subject to criminal prosecution. Only in such circumstances have Tennessee courts concluded that

marriages lawfully contracted in another state should be denied recognition. *See, e.g.*, *Rhodes v. McAfee*, 457 S.W.2d 522, 524 (Tenn. 1970) (holding that an out-of-state marriage between a stepfather and a stepdaughter following the stepfather's divorce from the mother was void where such marriage could be prosecuted as a felony in Tennessee). And although Tennessee courts from time to time have withheld recognition from particular marriages that so offended public policy as to violate criminal prohibitions, Tennessee never previously enacted a measure that categorically denied recognition to an entire class of marriages.[2]

Defendants argue that Tennessee's anti-recognition laws do not subject the marriages of same-sex couples to different or unusual treatment because, they assert, Tenn. Code Ann. § 36-3-113(d) and Article XI, section 18 of the Tennessee Constitution silently changed over a century of prior law, and these provisions now categorically bar recognition by Tennessee of *any and all marriages* that could not be entered into in Tennessee. *See* Def. Br. at 18-20. Defendants cite to no authority in support of this position, and the text and history of these provisions make plain that Tennessee's anti-recognition laws were never intended and have

[2] Although Tennessee never enacted a statute or constitutional provision expressly barring recognition of interracial marriages from other states, as opposed to provisions barring entry into such marriages in Tennessee, the Tennessee Supreme Court did effectively preclude recognition of out-of-state interracial marriages by upholding the criminal prosecution of a white man for cohabiting with his African-American wife despite their valid marriage in Mississippi. *State v. Bell*, 66 Tenn. 9, 10 (1872).

never been applied to invalidate an opposite-sex marriage. Instead, Tennessee continues to recognize as a matter of course out-of-state marriages that could not have been entered into in Tennessee, unless those marriages are between same-sex couples. *See* cases cited *infra* at 23.

Defendants' position is belied by the very language of the Amendment and the act that contained Section 113(d), each of which expressly restricts its scope to marriages of same-sex couples. The Amendment expressly limits recognition to opposite-sex marriages, stating: "The . . . relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state"; and "[i]f another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state *by the provisions of this section*, then the marriage shall be void and unenforceable in this state." (emphasis added).

Section 113(d) is restricted by the caption of the act of which it was a part. That caption candidly states that it is "AN ACT To amend Tennessee Code Annotated, Title 36, Chapter 3, *relative to same sex marriages* and the enforceability of *such* marriage contracts." 1996 Tenn. Pub. Acts 1031 (emphasis added). Under article II, section 17 of the Tennessee Constitution, the subject of a legislative act must be accurately expressed in its caption. *See Tenn. Mun. League v. Thompson*, 958 S.W.2d 333, 338 (Tenn. 1997). Defendants' interpretation of Section 113(d) to prohibit recognition by Tennessee of any out-of-state marriage

inconsistent with Tennessee law would render the statute void under Article II, section 17. *See id.*

Not surprisingly, no court has adopted Defendants' newfound interpretation since the enactment of Section 113(d) in 1996. Instead, Tennessee courts have continued to recognize and apply the longstanding rule that a marriage validly entered into in another state will be treated as valid in Tennessee, even if the marriage would not be permitted under Tennessee law. *See, e.g.*, *Farnham*, 323 S.W.3d at 140; *Lindsley v. Lindsley*, No. E2011-00199-COA-R3-CV, 2012 WL 605548, *1 (Tenn. Ct. App. Feb. 27, 2012); *Bowser v. Bowser*, No. M2001-01215-COA-R3CV, 2003 WL 1542148, *1 (Tenn. Ct. App. March 26, 2003); *Stoner v. Stoner*, No. W2000-01230-COA-R3-CV, 2001 WL 43211, *3 (Tenn. Ct. App. Jan. 18, 2001); *Payne v. Payne*, No. 03A01-9903-CH-00094, 1999 WL 1212435, *4 (Tenn. Ct. App. Dec. 17, 1999); *Ochalek v. Richmond*, No. M2007-01628-COA-R3-CV, 2008 WL 2600692, *6 n.9 (Tenn. Ct. App. Jan. 30, 2008).

In sum, Tennessee's anti-recognition laws represent a stark departure from its past and current treatment of out-of-state marriages. For the reasons explained below, Tennessee's refusal to recognize the marriages of an entire category of persons who validly married in other states, solely to exclude a disfavored group from the ordinary legal protections and responsibilities they would otherwise

enjoy, and despite the severe, harmful impact of that refusal, cannot withstand constitutional scrutiny.

B. Tennessee's Anti-Recognition Laws Deprive Plaintiffs Of Due Process.

As demonstrated below, Tennessee's denial of recognition to same-sex spouses cannot survive any level of constitutional review, much less the heightened scrutiny the anti-recognition laws require, because they interfere with two fundamental rights: (1) the fundamental right to privacy and respect for an existing marital relationship; and (2) the fundamental right to marry.

1. Tennessee's Anti-Recognition Laws Impermissibly Burden Plaintiffs' Fundamental Right To Privacy And Respect For Their Existing Marriages.

Windsor held that the federal government's refusal to recognize legally married same-sex couples deprived them "of the liberty of the person protected by the Fifth Amendment of the Constitution." 133 S. Ct. at 2695. Like Section 3 of DOMA, Tennessee's anti-recognition laws treat the valid marriages of same-sex couples as nullities, denying them recognition for all purposes under state law, just as DOMA did under federal law. In both cases, the denial of recognition deprives legally married same-sex couples of their protected right to dignity and respect for their marriages, burdening "many aspects of married and family life, from the mundane to the profound," and subjecting these families to ongoing stigma and

harm. *Id*. at 2694. No legitimate, much less compelling reason, serves to overcome the deliberate infliction of those substantial harms.

a. Married couples have a fundamental liberty interest in their marriages.

Windsor's holding that married couples have a protected liberty interest in their marriages confirms longstanding and well-established law that spousal relationships, like parent-child relationships, are among the intimate family bonds whose "preservation" must be afforded "a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). In *M.L.B. v. S.L.J.*, the Supreme Court explained: "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society," and laws that interfere with those relationships require "close consideration." 519 U.S. 102, 116-17 (1996) (internal citations and quotations omitted). As these and other similar cases show, the right to privacy and respect for an existing marital relationship is, in itself, a distinct fundamental right, independent of an individual's right to marry in the first instance. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring in the judgment) (noting difference between "a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude" and "regulation of the conditions of entry into . . . the marital bond").

Under these precedents, married couples have a fundamental right to remain married and to have their marriages respected by the government. In *Griswold v. Connecticut*, the Supreme Court invalidated a state law forbidding married couples to use contraceptives, holding that such a measure impermissibly intruded into the protected privacy of the marital relationship. 381 U.S. 479, 485-86 (1965) (stating that "[t]he very idea [of enforcing such a law] is repulsive to the notions of privacy surrounding the marital relationship"). *See also Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (recognizing "marital privacy" as an established fundamental right); *Bell v. Ohio State University*, 351 F.3d 240, 250 n.1 (6th Cir. 2003) (same).

b. Married same-sex couples have the same fundamental interest in their marriages as others and must be treated with "equal dignity" under the law.

Windsor affirmed that marriage is a status of "immense import" and held that the government's refusal to recognize the legal marriage of same-sex couples violates their due process rights. 133 S. Ct. at 2692. Nothing in *Windsor* suggests that, for constitutional purposes, the marriages of same-sex couples are somehow different from the marriages of opposite-sex couples. To the contrary, the Court emphasized that the marriages of same-sex couples and opposite-sex couples are entitled to "equal dignity." *Id*. at 2693.

Appellants' argument that *Windsor*'s holding applies only to the federal government has no merit. A protected liberty interest in a family relationship is

safeguarded from unjustified intrusion by any level of government—federal or state. For example, a person's protected interest in maintaining parent-child bonds exists regardless of whether that interest is threatened by the federal government or a state. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 67 (2000) (invalidating state law that impermissibly infringed upon parental rights).

As federal district courts hearing challenges to similar state anti-recognition laws have uniformly concluded, Plaintiffs have the same fundamental interest in their marriages as did the plaintiffs in *Windsor*, *Griswold*, *Loving v. Virginia*, 388 U.S. 1 (1967), and other cases involving attempts by the government to interfere with the relationships of married couples. *See Obergefell*, 962 F. Supp. 2d at 978 (finding that non-recognition violates "the right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections."); *Henry v Himes*, No.1:14-cv-129, 2014 WL 1418395, at *9 (S.D. Ohio Apr.14, 2014) (same); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (same); *Baskin v. Bogan*, No. 1:14-cv-00355, 2014 WL 1814064 (S.D. Ind. May 8, 2014) (same).

Like the plaintiff in *Windsor*, Plaintiffs are already legally married. The Plaintiff couples have demonstrated their commitment to one another by marrying in the state where they formerly resided. They seek to be treated as equal, respected, and participating members of society who—like others—are entitled to respect for their legal marriages. Tennessee's law is subject to, and cannot survive,

the same heightened scrutiny applied to other laws that burden the fundamental right to equal dignity, privacy, and autonomy in maintaining an existing marital relationship.

c. Tennessee's anti-recognition laws violate Plaintiffs' fundamental right to privacy and respect for their marriages.

Tennessee's refusal to recognize Plaintiffs' marriages constitutes an extraordinary disruption of their lives, stripping them of the marital protections and responsibilities they previously enjoyed in the state where they married. The negative impact on Plaintiffs' stability, security, and dignity is as severe as that caused by federal non-recognition in *Windsor*, exposing their families to continuing legal vulnerabilities and harms. Indeed, "nullification of a valid marriage when both partners wish to remain legally married constitutes the most extreme form of state interference imaginable in the marital relationship." Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages*, 60 Hastings L.J. 1063, 1125 (2009).

Defendants misconstrue key language from *Windsor* as supportive of their position, when in fact that language highlights the types of harm that discriminatory marriage recognition laws inflict and that the Constitution cannot tolerate. *See* Appellants' Brief at 16-17. The Court in *Windsor* found that DOMA

deviated from "the long-established precept that the incidents, benefits, and obligations of marriage *are uniform for all married couples within each State*." *Windsor*, 133 S. Ct. at 2692 (emphasis added). Tennessee's anti-recognition laws share such a defect. The federal government recognizes the marriages of the Plaintiff couples for almost all federal "incidents, benefits, and obligations of marriage." *Id.* But Tennessee denies the Plaintiff couples access to "incidents, benefits, and obligations of marriage" under Tennessee law. Thus, the anti-recognition laws create a situation in which "the incidents, benefits, and obligations of marriage" are *not* "uniform for all married couples within [the] State" of Tennessee. *Id.* All opposite-sex married couples enjoy the protections that both Tennessee and the federal government guarantee for married couples. Same-sex couples, however, have access to federal spousal protections, but are denied access to state law spousal protections. As in *Windsor*, this unequal treatment "places same-sex couples in an unstable position of being in a second-tier marriage." *Id*. at 2694.

2. Tennessee's Anti-Recognition Laws Deprive Plaintiffs Of Their Fundamental Right To Marry.

Tennessee's anti-recognition laws also impermissibly burden Plaintiffs' right to marry by penalizing each of them for having exercised that right to marry a person of the same sex. Plaintiffs do not assert a novel "right to same-sex marriage," as Appellants contend, but the same fundamental right to marry

repeatedly recognized by the Supreme Court. The right at issue here is no more a new "right to same-sex marriage" than the right in *Loving* was a "right to interracial marriage" or the right in *Turner* was a "right to prisoner marriage." The scope of a fundamental right does not depend on who is exercising it. For example, Tennessee could not strip a person of parental rights simply for being gay or lesbian. *See Hogue v. Hogue*, 147 S.W.3d 245, 253 (Tenn. Ct. App. 2004) ("Neither gay parents nor heterosexual parents have special rights. They are subject to the same laws, the same restrictions."). It is equally impermissible to strip Plaintiffs of their marital status simply because they are same-sex couples.

Like other fundamental rights, "the right to marry is of fundamental importance for all individuals." *Zablocki*, 434 U.S. at 384 (internal quotations omitted). For many, it is "the most important relation in life." *Id*. It "is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486.

The freedom to marry is protected by the Constitution precisely because the intimate relationship a person forms, and the decision whether to formalize such a relationship through marriage, implicate deeply held personal beliefs and core values. *Roberts*, 468 U.S. at 619-20. Permitting the government, rather than the individual, to make such personal decisions would impose an intolerable burden on individual dignity and self-determination. *Loving*, 388 U.S. at 12 ("Under our

Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."); *Roberts*, 468 U.S. at 620 ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse."). As the California Supreme Court recognized when it became the first state supreme court to strike down a ban on marriage by interracial couples, people are not "interchangeable," and "the essence of the right to marry is freedom to join in marriage with the person of one's choice." *Perez v. Lippold (Perez v. Sharp)*, 198 P.2d 17, 21, 25 (Cal. 1948).

Same-sex couples have the same fundamental interests as others in the liberty, autonomy, and privacy that the fundamental right to marry protects. In *Windsor*, the Supreme Court confirmed that same-sex couples are like other couples with respect to "the inner attributes of marriage that form the core justifications for why the Constitution protects this fundamental human right." *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1200 (D. Utah 2013); *see also Bostic v. Rainey*, 970 F. Supp. 2d 456, 473 (E.D. Va. 2014) ("Gay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships" [which] "are created through the exercise of sacred, personal choices—choices, like the choices made by every other citizen, that must be free from unwarranted government interference."); *Wolf*

v. Walker, No. 14-cv-64-bbc, 2014 WL 2558444, at *19 (W.D. Wis. June 6, 2014) ("[T]he right to marry protected by the Constitution includes same-sex couples.").

Like the laws struck down in *Perez* and *Loving*, Tennessee's anti-recognition laws violate the Plaintiffs' dignity and autonomy by penalizing them for having exercised the freedom—enjoyed by all other Tennessee residents—to marry the person with whom each has forged enduring bonds of love and commitment and who, to each Plaintiff, is irreplaceable. The Plaintiffs ask to have their right to autonomy and privacy respected by the State of Tennessee to the same degree, and in the same way, as it does for other married couples—by recognizing their legal marriages.

C. Tennessee's Anti-Recognition Laws Deny Plaintiffs Equal Protection Of The Laws.

Tennessee's anti-recognition laws facially discriminate against legally married same-sex couples—the same class at issue in *Windsor*—in violation of equal protection. *See Windsor*, 133 S. Ct. at 2695 ("The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by [a] State."). The Fourteenth Amendment's Equal Protection Clause ensures that the law "neither knows nor tolerates classes among citizens," so that the law remains neutral "where the rights of persons are at stake." *Romer*, 517 U.S. at 623 (citations and internal quotation marks omitted).

Tennessee's anti-recognition laws violate that basic proscription by discriminating against a class of Tennesseans based on their sexual orientation and gender.

Windsor requires that when a law intentionally disadvantages same-sex couples, courts must carefully scrutinize the law's effects and the state's reasons for enacting it. *Windsor*, 133 S. Ct. at 2693 (applying "careful consideration" to a law intended to treat same-sex couples unequally). Similarly, when a law discriminates on the basis of sex, courts apply heightened scrutiny. *United States v. Virginia*, 518 U.S. 515, 524 (1996) ("[A] party seeking to uphold government action based on sex must establish an exceedingly persuasive justification for the classification.") (internal citations and quotation marks omitted). Because Tennessee's anti-recognition laws intentionally discriminate against same-sex couples, they require the same careful scrutiny applied in *Windsor*, which in turn requires their invalidation.

Although the Supreme Court in *Windsor* did not refer to the traditional equal protection and due process categories of strict, intermediate, or rational basis scrutiny, it declared that DOMA's purposeful discrimination against married same-sex couples required "careful consideration," which indicates a heightened level of review. *Windsor*, 133 S. Ct. at 2693. As another Court of Appeals recently explained, based on the *Windsor* Court's reasoning and analysis, it is apparent that *Windsor* involved "something more than traditional rational basis review."

SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 483 (9th Cir. 2014) (citation and internal quotation marks omitted).

While this Court previously has held that laws that discriminate on the basis of sexual orientation are subject to rational basis scrutiny, all of those decisions predate *Windsor*. *See Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-93 (6th Cir. 1997); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012). Unlike this Court's earlier cases, *Windsor* directly addressed the due process and equal protection analysis that must be applied when a law purposefully treats legally married same-sex couples unequally, as Tennessee's anti-recognition laws do. Therefore, it is *Windsor*'s analysis that must be applied in this case.[3]

[3] Application of heightened scrutiny is also supported by the factors traditionally applied by the Supreme Court to identify classifications triggering heightened scrutiny under the Equal Protection Clause: (1) whether a classified group has suffered a history of invidious discrimination; (2) whether the classification has any bearing on a person's ability to perform in or contribute to society; (3) whether the characteristic is immutable or an integral part of one's identity; and (4) whether the group is a minority or lacks sufficient political power to protect itself through the democratic process. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976). Sexual orientation readily satisfies all of these factors, as many courts have acknowledged. *See, e.g., Windsor v. United States*, 699 F.3d 169, 181 (2nd Cir. 2012); *In re Marriage Cases*, 183 P.3d 384, 442-43 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431-32 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865, 884 (N.M. 2013); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); *Obergefell*, 962 F.

Regardless, Tennessee's anti-recognition laws not only fail the heightened scrutiny test, they cannot satisfy even the more basic rational basis test. As every court to address the issue since *Windsor* has concluded, and as demonstrated in subsection D below, there is no rational connection between any purported governmental interest and Tennessee's refusal to extend the protections and obligations of civil marriage to same-sex couples who legally married in other states.

1. *Windsor* Invalidated A Law That Intentionally Treated Same-Sex Couples Unequally, Just As Tennessee's Anti-Recognition Laws Do.

In *Windsor*, the Supreme Court held that DOMA, which excluded married same-sex couples from federal benefits, violated "basic due process and equal protection principles" because it was enacted in order to treat a particular group of people unequally. 133 S. Ct. at 2693. The Court found that no legitimate purpose could "overcome" its discriminatory purpose and effect. *Id.* at 2696.

Windsor makes clear that, when considering a law that facially disadvantages same-sex couples—as Tennessee's anti-recognition laws plainly do—courts may not blindly defer to hypothetical justifications proffered by the State, but must carefully consider the purpose underlying its enactment and the

---

Supp. 2d at 991; *De Leon v. Perry*, 975 F. Supp. 2d 632, 651-53 (W.D. Tex. 2014); *Henry v. Himes*, No. 1:14–cv–129, 2014 WL 1418395, *14 (S.D. Ohio Apr. 14, 2014).

actual harms it inflicts.[4] *Id.* Moreover, the court must strike down the law unless a "legitimate purpose overcomes" the "disability" imposed on the affected class of individuals. *Id.*

Windsor concluded that "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages" was the "essence" of the statute. *Id.* The Court also noted that DOMA exposed same-sex couples to serious harms: "Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways . . . from the mundane to the profound." *Id.* at 2694. This differential treatment "demeans the couple." *Id.*

Just as the "principal purpose" and "necessary effect" of DOMA were to "impose inequality" on same-sex couples and their children, *id.* at 2694, 2695, so

[4] As shown in section II.A above, Defendants are incorrect in arguing that Tennessee's anti-recognition laws treat married same-sex couples the same as other couples married in other states whose marriages could not have been performed in Tennessee. Even if Defendants were correct, however, that the constitutional and statutory provisions challenged in this case created a broad new rule barring recognition of *all* out-of-state marriages that do not comply with Tennessee's own marriage laws, the anti-recognition laws would still violate equal protection. A law that facially discriminates against a particular group is not insulated from challenge under the Equal Protection Clause merely because other laws may *also* subject other classes of persons to adverse treatment. Even if Defendants' interpretation of the anti-recognition laws were correct, that would not change the fact that Tennessee *expressly* discriminates against all married same-sex couples, nor would it alter the fact that these laws were enacted for the improper purpose of disadvantaging married same-sex couples, which the Constitution forbids, as *Windsor* held.

too the purpose and effect of Tennessee's anti-recognition laws are to prevent same-sex couples from gaining the protections of marriage. Like DOMA, Tennessee's anti-recognition laws did not create any new rights or protections for opposite-sex couples; rather, their only purpose and effect are to treat same-sex couples unequally. *See, e.g.*, *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *13 (W.D. KY Feb. 12, 2014) ("Justice Kennedy's analysis [in *Windsor*] would seem to command that a [state] law refusing to recognize valid out-of-state same-sex marriages has only one effect: to impose inequality."); *De Leon*, 975 F. Supp. 2d at 655 (same).

Moreover, like DOMA, Tennessee law inflicts serious harms on same-sex couples, depriving them of hundreds of rights and protections and stigmatizing their families as inferior and unworthy of respect. In a manner unprecedented in Tennessee's history, Tennessee's anti-recognition laws disregard the longstanding, deeply rooted, and otherwise universal rule that a marriage that is validly entered into by a couple in one state will be recognized in Tennessee unless there is a compelling reason not to do so. By treating legally married same-sex couples as legal strangers to one another, Tennessee disrupts their protected family relationships and forces them, unlike other married couples, to give up their marital status and be treated as unrelated individuals upon entering the state.

By design, Tennessee's anti-recognition laws deprive married same-sex couples of the certainty, stability, permanence, and predictability that other couples who married outside Tennessee automatically enjoy. Like DOMA, such a law requires, and cannot survive, "careful consideration," because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" a subset of married persons. *Windsor*, 133 S. Ct. at 2692, 2696. Indeed, as explained in subsection D below, it cannot survive any level of constitutional review.

2. Tennessee's Anti-Recognition Laws Impermissibly Classify On The Basis of Gender And Rely On Outdated Gender-Based Expectations.

Tennessee's anti-recognition laws openly discriminate based on gender. For example, Dr. Tanco's marriage would be recognized if Dr. Jesty were a man instead of a woman. Tennessee refuses to recognize Plaintiffs' marriages solely because of the sex of the spouses. *See Kitchen*, 961 F. Supp. 2d 1181, 1206 ("Amendment 3 [Utah's law excluding same-sex couples from marriage] involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman."); *Perry*, 704 F. Supp. 2d at 996 (state marriage ban discriminates based both on sexual orientation and gender).

Further, the fact that Tennessee's anti-recognition laws prohibit both men from marrying men and women from marrying women does not alter the

conclusion that they discriminate based on gender. In *Loving*, the Supreme Court rejected the argument that Virginia's law prohibiting interracial marriage should stand because it imposed its restrictions "equally" on members of different races. 388 U.S. at 8; *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991) (holding "that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree" and that race-based peremptory challenges are invalid even though they affect all races); *Perez*, 198 P.2d at 20 ("The decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups.").

That same reasoning applies to gender-based classifications. *See J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 140-41 (1994) (holding that sex-based peremptory challenges are unconstitutional even though they affect both male and female jurors). Under *Loving*, *Powers*, and *J.E.B.*, the gender-based classifications in Tennessee's anti-recognition laws may not be upheld simply because they affect men and women as groups in the same way, while discriminating against individuals based on their gender.

The relevant inquiry under the Equal Protection Clause is whether the law treats an *individual* differently because of his or her gender. *Id.* "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities

are sometimes the mechanism by which the State violates the individual right in question)." *Id.* at 152 (Kennedy, J., concurring in the judgment).

Tennessee's anti-recognition laws also impermissibly seek to enforce a gender-based requirement that a woman should be married only to a man, and that a man should be married only to a woman. That gender-based restriction is out of step with Tennessee's own marriage laws, which otherwise treat spouses equally regardless of their gender. For many years, Tennessee law imposed differing duties and roles on husbands and wives. *See, e.g.*, *Prewitt v. Bunch*, 50 S.W. 748, 751 (Tenn. 1899) (describing husband's rights to wife's property during coverture, under which "marriage amounts to an absolute gift to the husband of all person goods of . . . the wife"). Under Tennessee's current law, however, the legal rights and responsibilities of marriage are the same for both spouses, without regard to gender. Act of Feb. 20, 1913, ch. 26, 1913 Tenn. Pub. Acts 59 (codified at Tenn. Code Ann. § 36-3-504) (abolishing doctrine of coverture); *Davis v. Davis*, 657 S.W.2d 753, 754, 759 (Tenn. 1983) (abolishing the doctrine of interspousal tort immunity, which was based in "antiquity, in which a woman's marriage rendered her a chattel of her husband," which is "now a historical oddity rather than a functioning concept of law") (internal quotation omitted); Tenn. Code Ann. § 36-5-101 ("either spouse" may be required to pay child support upon the dissolution of a marriage); Tenn. Code Ann. § 36-5-121 (providing that either spouse may be

required to pay spousal support and maintenance upon the dissolution of a marriage).

Similarly, recognizing women's entitlement to equality in all aspects of life, the Supreme Court has held that men and women must be on equal footing in marriage. *See, e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 202 (1977) (invalidating gender-based distinction between spouses in the Social Security Act); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 (1975) (same); *cf. Reed v. Reed*, 404 U.S. 71, 74 (1971) (invalidating state statute requiring courts to give preference to men when appointing administrators of estates).

Because Tennessee's current marriage laws do not treat husbands and wives differently in any respect, Tennessee spouses have the same rights and obligations regardless of their gender. As such, there is no rational foundation for requiring spouses to have different genders. Today, that requirement is an irrational vestige of the outdated notion—long rejected in other respects by the Tennessee Legislature and the courts—that men and women have different "proper" roles in marriage.

Under settled law, gender-based classifications are presumed to be unconstitutional; such a law can be upheld only if supported by an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 524 (internal quotation marks omitted). Tennessee's reliance on gender to exclude same-sex couples is not

supported by any exceedingly persuasive justification. To the contrary, as explained directly below, it cannot survive any level of constitutional review.

D. Tennessee's Anti-Recognition Laws Are Unconstitutional Under Any Standard Of Review Because They Do Not Rationally Advance Any Legitimate Government Interest.

As demonstrated above, Tennessee's anti-recognition laws require heightened scrutiny because: (1) they deprive gay and lesbian persons of fundamental due process rights; (2) they deliberately target same-sex couples in order to treat them unequally based on their sexual orientation; and (3) they expressly classify based on gender. No asserted justification for Tennessee's anti-recognition laws can satisfy this heightened scrutiny, just as the proffered justifications for DOMA failed to support that law.

But even if heightened scrutiny did not apply, the anti-recognition laws would also fail the rational basis test, as federal and state courts that have considered similar laws since *Windsor* have uniformly concluded. *See, e.g.*, *Kitchen*, 961 F. Supp. 2d at 1206-07 (holding that "because the court finds that [Utah's marriage ban and anti-recognition law] fails rational basis review, it need not analyze why Utah is also unable to satisfy the more rigorous standard" required by gender-based discrimination); *Bostic*, 970 F. Supp. 2d at 482 ("Virginia's Marriage Laws fail to display a rational relationship to a legitimate purpose, and so

must be viewed as constitutionally infirm under even the least onerous level of scrutiny.").

Defendants proffer only one purported governmental interest which they claim justifies Tennessee's refusal to recognize the marriages of same-sex couples. One purpose of marriage, they assert, is "ensuring that accidental pregnancies are more likely to occur within a stable family unit bound by marriage." Appellants' Br. at 26 n.15. Because same-sex couples cannot procreate "naturally," Defendants contend that "[b]iology alone" justifies Tennessee's refusal to recognize Plaintiffs' legal marriages. *Id.* at 25.

This same so-called "responsible procreation" justification was among the governmental interests asserted in defense of Section 3 of DOMA. *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at *44-*47. The Supreme Court found this asserted interest insufficient to support DOMA's categorical denial of federal recognition. "Responsible procreation" provides no greater justification for Tennessee's official denigration of married same-sex couples and their families, or for its withholding from those couples of the many legal protections and benefits of marriage, than it did for the federal government's action in refusing to recognize same-sex couples' marriages in Section 3 of DOMA. Indeed, if supporting the raising of children

within stable family units is the purpose of marriage, Tennessee's anti-recognition laws undermine rather than advance that goal, because the sole effect of those laws is to *deny* protections to the children being raised by same-sex couples in Tennessee, including the children of Plaintiffs.

Nor can Tennessee's anti-recognition laws be justified by arguing that married opposite-sex couples make better parents than married same-sex couples. As an initial matter, the scientific consensus of national health care organizations charged with the welfare of children and adolescents—based on a significant and well-respected body of research—is that children and adolescents raised by same-sex parents are as well-adjusted as children raised by opposite-sex parents. *See* Brief of American Psychological Association, et al. as Amici Curiae on the Merits in Support of Affirmance, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 871958.

Numerous courts have recognized this overwhelming scientific consensus. *See, e.g., Golinski v. United States Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 991 (N.D. Cal. 2012) ("More than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents") (citations omitted); *Obergefell*, 962 F. Supp. 2d 968 at 994 n.20 (same); *DeBoer v.*

Snyder, 973 F. Supp. 2d 757, 770 (E.D. Mich. 2014) ("[T]here is simply no scientific basis to conclude that children raised in same-sex households fare worse than those raised in heterosexual households."); *De Leon*, 975 F. Supp. 2d at 653 ("[Same-sex] couples are as capable as other couples of raising well-adjusted children.") (citations omitted).

But even if that scientific consensus did not exist, any attempt to justify Tennessee's anti-recognition laws based on asserted concerns about parenting or procreation would fail rational basis review for a more basic reason. Those assertions are not only completely unfounded, but they also have no rational or logical application to existing marriages or to children who are already being raised by legally married same-sex couples. As one district court recently explained: "Even if it were rational for legislators to speculate that children raised by heterosexual couples are better off than children raised by gay or lesbian couples, *which it is not,* there is simply no rational connection between the Ohio marriage recognition bans and the asserted goal, as Ohio's marriage recognition bans do not prevent gay couples from having children." *Obergefell*, 962 F. Supp. 2d at 994 (emphasis in original).

There is a complete logical disconnect between refusing to recognize the legal marriages of same-sex couples and advancing any legitimate governmental objective related to procreation or parenting. For example, in striking down

DOMA, the First Circuit noted that "DOMA does not increase benefits to opposite-sex couples—whose marriages may in any event be childless, unstable or both—or explain how denying benefits to same-sex couples will reinforce heterosexual marriage." *Massachusetts v. United States Dep't of Health & Human Servs.*, 682 F.3d 1, 14 (1st Cir. 2012). "This is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Id*. at 15 (internal citation omitted). These conclusions are equally true of Tennessee's anti-recognition laws. *See, e.g.*, *Bostic*, 970 F. Supp. 2d 456 at 478 ("Of course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite-sex couples fails to further this interest."); *see also Bishop v. United States ex. rel. Holder*, 962 F. Supp. 2d 1252, 1293-94 (N.D. Okla. 2014) (same); *Kitchen*, 961 F. Supp. 2d at 1211-12 (same); *Obergefell*, 962 F. Supp. 2d at 994-95 (same); *Bourke*, 2014 WL 556729, at *8 (same); *De Leon*, 975 F. Supp. 2d at 654-55 (same).

Moreover, the Constitution protects all individuals' rights, including those who do not wish to have children or are unable to do so because of age, infertility, or incarceration. *See Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (invalidating restriction on prisoner's right to marry because procreation is not an essential aspect of the right). As Justice Scalia's dissenting opinion in *Lawrence v. Texas*

acknowledged, "the encouragement of procreation" cannot "possibly" be a justification for barring same-sex couples from marriage "since the sterile and the elderly are allowed to marry." 539 U.S. 558, 604-05 (2003) (Scalia, J., dissenting); *see also Bostic*, 970 F. Supp. 2d at 478-79 ("The 'for-the-children' rationale also fails because it would threaten the legitimacy of marriages involving post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating."); *DeBoer*, 973 F. Supp. 2d at 771-72 (same).

In sum, no legitimate government interest justifies Tennessee's anti-recognition laws. Because Tennessee cannot offer a constitutionally sufficient justification for the serious harms inflicted by these laws, the state cannot permissibly exclude Plaintiffs' lawful marriages from its general rule of marriage recognition, nor can it strip them of an existing marital status simply because they married in another state. Tennessee's constitutional and statutory anti-recognition provisions are facially invalid under the due process and equal protection guarantees of the Fourteenth Amendment.

E. Tennessee's Anti-Recognition Laws Impermissibly Infringe Upon Plaintiffs' Exercise Of Their Constitutional Right To Interstate Travel.

The "virtually unconditional personal right, guaranteed by the Constitution to us all," *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quotation marks omitted), to "be free to travel throughout the length and breadth of our land uninhibited by

statutes, rules, or regulations which unreasonably burden or restrict this movement," *id.* at 499 (internal quotation marks omitted) "has repeatedly been recognized as a basic constitutional freedom."[5] *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 254 (1974). The right to travel includes the freedom "to migrate, resettle, find a new job, and start a new life," as Plaintiffs have done in this case. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). It is a right "firmly embedded in" our country's jurisprudence," and one which is essential to our federal system of government, whereby each "citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein." *Saenz*, 526 U.S. at 498, 503-04 (quotation marks omitted).

The fundamental right to interstate travel is among those basic aspects of our federal system that enables the United States truly to be one indivisible nation. The ability to experience the United States as a single nation is currently being denied to many legally married same-sex couples, including Plaintiffs. Because of laws such as Tennessee's anti-recognition laws, there are today *two Americas* for married same-sex couples—a group of states where it is safe for them to travel with their families and a second group of states, including Tennessee, where it is

[5] As the Court explained in *Shapiro*, there is no "particular constitutional provision" that serves as the source for the right to travel. 394 U.S. at 630. The Supreme Court has identified, for instance, the Privileges and Immunities Clause of Art. IV, section 2, the Privileges or Immunities Clause of the Fourteenth

not safe for them to travel or resettle if they expect to be recognized and protected as a family. The right to interstate travel is impermissibly burdened for families such as Plaintiffs' families if states may condition residency on the absolute loss of marital status and the legal protections and obligations that this status guarantees.

"A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when," as here, "it uses any classification which serves to penalize the exercise of that right." *Attorney General of N.Y. v. Soto-Lopez, et al.*, 476 U.S. 898, 903 (1986) (internal quotation marks and citations omitted). Tennessee's statutory scheme severely penalizes Plaintiffs' migration to the state by nullifying their marital status for state-law purposes. It is difficult to imagine a penalty as severe as the penalty that Tennessee law visits upon married same-sex couples—the penalty of having their marriage nullified and the elimination of hundreds of legal protections that Tennessee offers to other married couples and their children. Plaintiffs all entered into valid marriages in other states before moving to Tennessee. All of the Plaintiff couples moved to Tennessee to pursue their careers, including a veteran of the war in Afghanistan now stationed at an Army base in Memphis. The anti-recognition laws penalize these couples for moving to Tennessee by denying them the many legal protections that other families may take for granted.

Amendment, the Commerce Clause, and the Due Process Clause of the Fifth

Because Tennessee law severely penalizes Plaintiffs for exercising their right to travel, and because the penalty affects sufficiently important rights, the state must justify the law with "a compelling state interest." *Maricopa Cnty.*, 415 U.S. at 258; *see also Shapiro*, 394 U.S. at 634. For all of the reasons discussed in the prior section, Tennessee cannot offer a legitimate, let alone compelling, interest to justify its refusal to recognize Plaintiffs' validly celebrated marriages. Plaintiffs therefore are entitled to prevail on their right to travel claim.

F. *Baker v. Nelson* Does Not Control This Case.

Defendants' reliance on the Supreme Court's summary dismissal of the appeal in *Baker v. Nelson*, 409 U.S. 810 (1972), has no merit. A summary dismissal is dispositive only as to the "precise issues" presented in a case. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). At the time *Baker* was decided, no state permitted same-sex couples to marry. Therefore, *Baker* did not address the "precise issue" presented here: whether a state may categorically deny recognition to same-sex couples who legally married in other states.

Moreover, "doctrinal developments" have deprived *Baker* of precedential effect. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975). *Baker* was decided more than forty years ago, before the Supreme Court held that heightened equal protection scrutiny applies to sex-based classifications. *See Craig v. Boren*, 429

Amendment depending on the circumstances of a particular case. *Id.* at 630 n.8.

U.S. 190, 197 (1976). At the time *Baker* was decided, the Supreme Court had not yet held that laws enacted for the express purpose of disadvantaging a particular group violate the requirement of equal protection, *see United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973); applied that principle to laws that target gay people, *see Romer*, 517 U.S. at 635, and *Windsor*, 133 S. Ct. at 2693; held that same-sex couples have the same protected liberty interests in their relationships as others, *see Lawrence*, 539 U.S. at 578; affirmed that "the right to marry is of fundamental importance for all individuals," *see Zablocki*, 434 U.S. at 384; or held that even incarcerated persons who are unable to engage in procreative intimacy nonetheless have a protected right to marry, *see Turner v. Safley*, 482 U.S. 78, 94-97 (1987). In light of these profound developments since *Baker*, it is plain that the constitutional claims at issue in this case present substantial federal questions.

III. THE THREE REMAINING FACTORS ALSO SUPPORT THE DISTRICT COURT'S ENTRY OF AN INJUNCTION.

Plaintiffs are entitled to judgment on the merits on their constitutional claims, and the three remaining factors also strongly support injunctive relief in this action. *See Winter*, 555 U.S. at 20. First, the District Court correctly determined that the Plaintiffs will be irreparably harmed unless Defendants are enjoined from enforcing the anti-recognition law. *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 WL 997525, *7 (M.D. Tenn. Mar. 14, 2014). The loss of a constitutional right, "even for a minimal period[ ] of time, unquestionably

constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Further, "if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001).

As the District Court properly concluded, "the evidence shows that plaintiffs are suffering dignitary and practical harms that cannot be resolved through monetary relief." *Id.* Although Defendants attempt to minimize these harms by characterizing them as merely "reputational," the Supreme Court has expressly held that the stigma and humiliation inflicted by non-recognition of one's marriage are harms of constitutional dimension. *See Windsor*, 133 S. Ct. at 2695-96. Nothing in *Windsor* suggests that the injury inflicted by non-recognition of an existing, legal marriage would somehow be mitigated or lessened when inflicted by the state, rather than the federal government. If anything, because most of the rights and obligations of marriage derive from state rather than federal law, having one's lawful marriage disregarded by the state inflicts an even more demeaning, stigmatizing, and oppressive injury. *See Obergefell*, 962 F. Supp. 2d at 980-81.[6]

[6] Defendants' attempt to analogize the profound constitutional injury inflicted in this case to the "reputational" injury discussed in *Sampson v. Murray*, 415 U.S. 61 (1974), serves only to highlight the irrelevance of that case—and the absence of relevant authority supporting Defendants' position. *Sampson* held that possible hypothetical injuries to a probationary employee's reputation as a result of alleged procedural irregularities in the employee's discharge did not constitute the type of irreparable injury necessary to support a preliminary injunction. As this

Those injuries concern not merely potential, incidental, or temporary harm to the professional reputation of a particular person, but the intentional imposition of a categorical, caste-like stigma upon an entire group of lawfully-married couples and their children, with respect to one of our society's most central, highly esteemed, and deeply personal institutions. *See Windsor*, 133 S. Ct. at 2694.

In addition, the District Court correctly concluded that Plaintiffs suffered irreparable injury by being deprived of the hundreds of protections given to legal spouses under Tennessee's statutory, constitutional, and common law. The purpose of marriage is, in large part, to provide married couples with the security of having a legally-protected, legally-binding relationship that enables the spouses to join their lives together in a way that is respected by the state and third parties and that protects them not only in everyday life but in times of illness, crisis, injury, or death. As the evidence established, and as the District Court properly found, Tennessee's anti-recognition laws deprive Plaintiffs of that security and expose them to grievous and irreparable harm.

For example, Defendants do not dispute that, absent the District Court's injunction, Dr. Jesty would not have been recognized as the legal parent of the

---

Court has explained, "[t]he Supreme Court has established standards for judging claims of irreparable harm in federal personnel cases which are more stringent than those applicable to other classes of cases." *Gilley v. United States*, 649 F.2d 449, 454 (6th Cir. 1981); *see also Howe v. City of Akron*, 723 F.3d 651, 662 (6th Cir. 2013).

child born to her wife, Dr. Tanco, shortly after the injunction went into effect. Defendants' erroneous suggestion that Plaintiffs somehow could replicate the protections offered to opposite-sex married couples ignores the many practical and dignitary injuries imposed on Plaintiffs by the anti-recognition laws. Private documents cannot replicate the comprehensive obligations and protections given to married parents and their children, including the certainty that both spouses have a legally-protected relationship with the couple's child from the moment of birth.[7]

With respect to the third factor in the injunctive relief analysis—the balance of equities—Defendants have not offered any evidence that they will suffer any harm, much less harm that outweighs the severe harm to Plaintiffs, if Defendants'

[7] A vast array of legal rights, benefits, and obligations are available only with a state-recognized parent-child relationship, including, among many others: the right to have both parents involved in medical decision-making, *see* Tenn. Code Ann. §§ 36-6-101, 36-6-103; the ability to obtain health insurance and other employment-related benefits from both parents, *see* Tenn. Code Ann. §§ 56-7-2301, 36-5-101; the right to child support from both parents, *see* Tenn. Code Ann. § 36-5-101; the requirement that the state must meet strict requirements before terminating the parent-child relationship of either parent, *see* Tenn. Code Ann. §§ 36-1-113, 37-1-147; the right to receive Social Security benefits as a surviving child from both parents, *see* 42 U.S.C. § 402; the right to worker's compensation benefits in the event of either parent's death, *see* Tenn. Code Ann. § 50-6-210; the right to intestate inheritance from both parents, *see* Tenn. Code Ann. § 31-2-104; the right to bring a wrongful death suit in the event of either parent's death, *see* Tenn. Code Ann. § 20-5-107; and numerous other statutory, common law, and constitutional protections that attach only to a legal parent-child relationship. Plaintiffs are substantially injured by any requirement that they employ separate (and often uncertain and inadequate) methods to replicate a fraction of these legal protections rather than being treated the same as other married couples who have children.

enforcement of Tennessee's anti-recognition laws is enjoined. They do not identify any burden to the state or its agencies that would arise if the state is required to recognize the marriages of Plaintiffs and other same-sex couples. In any event, "[n]o substantial harm can be shown in the enjoinment of an unconstitutional policy." *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir. 2004) (affirming district court order granting preliminary injunction where city did not identify "any particular irreparable harm that it faces") (citation and internal quotation marks omitted); *Obergefell*, 962 F. Supp. 2d at 997.[8]

For similar reasons, the fourth and final factor—the public interest—also strongly supports the District Court's injunction. "It is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

---

[8] *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951), did not establish, as Defendants assert, that "the public interest favors federal courts denying extraordinary injunctive relief that may affect state domestic policy." Def. Br. at 32. Rather, the Supreme Court held that principles of comity prohibited federal courts from exercising jurisdiction where a plaintiff had initiated parallel state proceedings and, after an unfavorable ruling, attempted a collateral attack in federal court rather than appealing through the state system. Likewise, both *Massachusetts State Grange v. Benton*, 272 U.S. 525 (1926), and *Hawks v. Hamill*, 288 U.S. 52 (1933), are jurisdictional cases in which the Supreme Court ruled that each case should be *dismissed*. None of these cases alter the standard for issuing injunctions, which grants no special deference to state actors or state domestic policy.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the decision of the District Court and remand with instructions to enter final judgment and a permanent injunction prohibiting enforcement of Tennessee's Anti-Recognition Laws.

DATED: June 9, 2014

Respectfully submitted,

/s/ *William L. Harbison*
William L. Harbison
Phillip F. Cramer
J. Scott Hickman
John L. Farringer
SHERRARD & ROE, PLC
150 3rd Avenue South, Suite 1100
Nashville, Tennessee 37201
Email: bharbison@sherrardroe.com
Tel. 615-742-4200; Fax: 615-742-4539

Abby R. Rubenfeld
RUBENFELD LAW OFFICE, PC
2409 Hillsboro Road, Suite 200
Nashville, Tennessee 37212
Email: arubenfeld@rubenfeldlaw.com
Tel.: 615-386-9077; Fax: 615-386-3897

Shannon P. Minter
Christopher F. Stoll
Amy Whelan
Asaf Orr
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102
Email: sminter@nclrights.org
Tel.: 415-392-6257; Fax: 415-392-8442

Maureen T. Holland
HOLLAND AND ASSOCIATES, PLLC
1429 Madison Avenue
Memphis, Tennessee 38104-6314
Email: mtholland@aol.com
Tel.: 901-278-8120; Fax: 901-278-8125

Regina M. Lambert
7010 Stone Mill Drive
Knoxville, Tennessee 37919
Email: lambertregina@yahoo.com
Tel.: 865-679-3483; Fax: 865-558-8166

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 6 Cir. R. 32(a), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B):

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,802 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 6 Cir. R. 32(b)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Word 2013 in 14 point Times New Roman.

Dated: June 9, 2014

/s/ *William L. Harbison*

Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on June 10, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *William L. Harbison*

DESIGNATION OF DISTRICT COURT RECORD

Plaintiffs-Appellees designate the following district court documents:

District Court Docket No.	Description of Document	Page ID No.
1	Complaint	1
27	Answer to Complaint	94
29	Motion for Preliminary Injunction	114
30	Memorandum in Support of Motion for Preliminary Injunction	118
32	Notice of Filing in Support of Motion for Preliminary Injunction (Attachments: #1 Declaration of Valeria Tanco, # 2 Declaration of Sophy Jesty, #3 Exhibit A to Declaration of Sophy Jesty, #4 Exhibit B to Declaration of Sophy Jesty, #5 Exhibit C to Declaration of Sophy Jesty, #6 Exhibit D to Declaration of Sophy Jesty, #7 Exhibit E to Declaration of Sophy Jesty, #8 Declaration of Ijpe Dekoe, #9 Declaration of Thomas Kostura, #10 Declaration of Kellie Miller-Devillez, #11 Exhibit A to Declaration of Kellie Miller-Devillez, #12 Exhibit B to Declaration of Kellie Miller-Devillez, #13 Exhibit C to Declaration of Kellie Miller-Devillez, #14 Attachment Declaration of Vanessa Miller-Devillez, #15 Declaration of Johno Espejo, #16 Declaration of Matthew Mansell)	383
35	Response in Opposition to Motion for Preliminary Injunction	496

District Court Docket No.	Description of Document	Page ID No.
37	Notice of Filing in Opposition to Motion for Preliminary Injunction (Attachments: #1 Goins Declaration and Exhibit A, # Walden Affidavit and Exhibits A & B)	713
46	Reply to Response to Motion for Preliminary Injunction	792
67	Memorandum Opinion	1415
68	Order	1435
69	Preliminary Injunction	1436
74	Notice of Appeal	1517

ADDENDUM

UNPUBLISHED CASES FILED IN SUPPORT OF THE BRIEF OF PLAINTIFFS-APPELLEES

Baskin v. Bogan, No. 1:14-cv-00355, 2014 WL 1814064 (S.D. Ind. May 8, 2014)

Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014)

Bowser v. Bowser, No. M2001-01215-COA-R3CV, 2003 WL 1542148 (Tenn. Ct. App. March 26, 2003)

Henry v Himes, No.1:14-cv-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014)

Lindsley v. Lindsley, No. E2011-00199-COA-R3-CV, 2012 WL 605548 (Tenn. Ct. App. Feb. 27, 2012)

Ochalek v. Richmond, No. M2007-01628-COA-R3-CV, 2008 WL 2600692 (Tenn. Ct. App. Jan. 30, 2008)

Payne v. Payne, No. 03A01-9903-CH-00094, 1999 WL 1212435 (Tenn. Ct. App. Dec. 17, 1999)

Stoner v. Stoner, No. W2000-01230-COA-R3-CV, 2001 WL 43211 (Tenn. Ct. App. Jan. 18, 2001)

Tanco v. Haslam, No. 3:13-CV-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014)

Wolf v. Walker, No. 14-cv-64-bbc, 2014 WL 2558444 (W.D. Wis. June 6, 2014)

--- F.Supp.2d ----, 2014 WL 1814064 (S.D.Ind.)
(Cite as: 2014 WL 1814064 (S.D.Ind.))

H

Only the Westlaw citation is currently available.

United States District Court,
S.D. Indiana,
Indianapolis Division.

Marilyn Rae BASKIN and Esther Fuller; Bonnie Everly and Linda Judkins; Dawn Lynn Carver and Pamela Ruth Elease Eanes; Henry Greene and Glenn Funkhouser, individually and as parents and next friends of C.A.G.; Nikole Quasney, and Amy Sandler, individually and as parents and next friends of A.Q.-S. and M.Q.-S., Plaintiffs,

v.

Penny BOGAN, in her official capacity as Boone County Clerk; Karen M. Martin, in her official capacity as Porter County Clerk; Michael A. Brown, in his official capacity as Lake County Clerk; Peggy Beaver, in her official capacity as Hamilton County Clerk; William C. VanNess II, M.D., in his official capacity as the Commissioner, Indiana State Department of Health; and Greg Zoeller, in his official capacity as Indiana Attorney General, Defendants.

No. 1:14–cv–00355–RLY-TAB.
Signed May 8, 2014.

Background: Lesbian couple married out of state filed action challenging constitutionality of Indiana statute banning same-sex marriage. After the District Court, Richard L. Young, Chief Judge, —— F.Supp.2d ——, 2014 WL 1568884, granted couple's motion for temporary restraining order (TRO), couple moved for preliminary injunction.

Holdings: The District Court, Richard L. Young, Chief Judge, held that:
(1) couple had standing to seek preliminary injunction;
(2) couple was likely to succeed on merits;
(3) couple suffered irreparable injury; and
(4) balance of harms and public interests weighed in favor of preliminary injunction.

Motion granted.

West Headnotes

[1] Injunction 212 1075

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(A) Nature, Form, and Scope of Remedy
212k1075 k. Extraordinary or unusual nature of remedy. Most Cited Cases

A preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it.

[2] Injunction 212 1091

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1091 k. In general. Most Cited Cases

A court analyzes a motion for a preliminary injunction in two distinct phases, that is, a threshold phase and a balancing phase.

[3] Injunction 212 1092

212 Injunction
212II Preliminary, Temporary, and Interlocutory

--- F.Supp.2d ----, 2014 WL 1814064 (S.D.Ind.)
(Cite as: 2014 WL 1814064 (S.D.Ind.))

Injunctions in General
212II(B) Factors Considered in General
212k1092 k. Grounds in general; multiple factors. Most Cited Cases

Injunction 212 1571

212 Injunction
212V Actions and Proceedings
212V(E) Evidence
212k1567 Weight and Sufficiency
212k1571 k. Preponderance of evidence. Most Cited Cases

Under the threshold phase for preliminary injunctive relief, a plaintiff must establish, and has the ultimate burden of proving by a preponderance of the evidence, each of the following elements: (1) some likelihood of success on the merits; (2) absent a preliminary injunction; she will suffer irreparable harm; and (3) traditional legal remedies would be inadequate.

[4] Injunction 212 1096

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1094 Entitlement to Relief
212k1096 k. Likelihood of success on merits. Most Cited Cases

To satisfy the requirement for a preliminary injunction of some likelihood of success on the merits, a plaintiff's chance of success must be more than negligible.

[5] Injunction 212 1092

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1092 k. Grounds in general; multiple factors. Most Cited Cases

Injunction 212 1109

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1109 k. Balancing or weighing hardship or injury. Most Cited Cases

If a court determines that a moving party has failed to demonstrate any one of the threshold requirements for a preliminary injunction, it must deny the injunction; if, on the other hand, the court determines the moving party has satisfied the threshold phase, the court then proceeds to the balancing phase of the analysis.

[6] Injunction 212 1109

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1109 k. Balancing or weighing hardship or injury. Most Cited Cases

The balancing phase for a preliminary injunction analysis requires a court to balance the harm to a moving party if the injunction is denied against the harm to the nonmoving party if the injunction is granted; in so doing, the court utilizes what is known as the sliding scale approach, that is, the more likely the movant will succeed on the merits, the less the balance of irreparable harms need favor the movant's

--- F.Supp.2d ----, 2014 WL 1814064 (S.D.Ind.)
(Cite as: 2014 WL 1814064 (S.D.Ind.))

position.

[7] Injunction 212 1100

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1100 k. Public interest considerations. Most Cited Cases

The balancing stage in the analysis regarding a preliminary injunction requires a court to consider any effects that granting or denying the preliminary injunction would have on nonparties, that is, the public interest.

[8] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 k. In general; injury or interest. Most Cited Cases

Federal Civil Procedure 170A 103.3

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.3 k. Causation; redressability. Most Cited Cases

To have standing a plaintiff must present an injury that is concrete, particularized, and actual or imminent, fairly traceable to a defendant's challenged behavior, and likely to be redressed by a favorable ruling.

[9] Civil Rights 78 1331(6)

78 Civil Rights
78III Federal Remedies in General
78k1328 Persons Protected and Entitled to Sue
78k1331 Persons Aggrieved, and Standing in General
78k1331(6) k. Other particular cases and contexts. Most Cited Cases

In action against state and county officials alleging Indiana's statutory ban on same-sex marriage violated Fourteenth Amendment due process and equal protection, lesbian couple married out of state had standing to seek preliminary injunction to prevent enforcement of provision banning recognition of same-sex marriages performed outside the state as applied to them; officials were required to enforce ban, ban harmed couple in numerous ways, including causing couple to drive to another state where marriage was recognized in order for one of them to receive medical care and dignity of marital status, and preliminary injunction would redress claimed injury. U.S.C.A. Const.Amend. 14; West's A.I.C § 31–11–1–1.

[10] Civil Rights 78 1457(7)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(7) k. Other particular cases and contexts. Most Cited Cases

Lesbian couple married out of state was likely to succeed on merits of Fourteenth Amendment equal protection challenge to Indiana's ban on recognizing same-sex marriages performed out of state, even under rational basis standard of review, as required for preliminary injunction preventing enforcement of provision as applied to couple; state asserted interest in

--- F.Supp.2d ----, 2014 WL 1814064 (S.D.Ind.)
(Cite as: 2014 WL 1814064 (S.D.Ind.))

preserving "traditional marriage" to encourage responsible procreation and raising children in household with both male and female role models, but state viewed heterosexual couples who, for whatever reason, were not capable of producing children as furthering those interests. U.S.C.A. Const.Amend. 14; West's A.I.C § 31–11–1–1(b).

[11] Civil Rights 78 1457(7)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(7) k. Other particular cases and contexts. Most Cited Cases

Lesbian couple married out of state was likely to succeed on merits of Fourteenth Amendment due process challenge to Indiana's ban on recognizing same-sex marriages performed out of state, as required for preliminary injunction preventing enforcement of provision as applied to couple; denying recognition of same-sex marriages performed out of state was departure from Indiana's general rule of recognizing out of state marriages, including marriages between first cousins despite fact that they could not marry in Indiana. U.S.C.A. Const.Amend. 14; West's A.I.C § 31–11–1–1(b).

[12] Injunction 212 1106

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1106 k. Irreparable injury. Most Cited Cases

"Irreparable harm," required for a preliminary injunction, is harm which cannot be repaired, retrieved, put down again, atoned for; the injury must be of a particular nature, so that compensation in money cannot atone for it.

[13] Civil Rights 78 1457(7)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(7) k. Other particular cases and contexts. Most Cited Cases

Lesbian couple suffered irreparable injury as result of Indiana's statutory refusal to recognize their marriage performed out of state, as required in action alleging statute violated Fourteenth Amendment equal protection and due process for preliminary injunction to prevent enforcement of statute as applied to couple; couple asserted constitutional injury in denial of equal protection and due process, one of them was sick and had to drive out of state to receive treatment at hospital where marriage was recognized, and she could pass away without enjoying dignity that official marriage status conferred. U.S.C.A. Const.Amend. 14; West's A.I.C § 31–11–1–1(b).

[14] Civil Rights 78 1457(7)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(7) k. Other particular cases and contexts. Most Cited Cases

In action alleging violations of Fourteenth Amendment equal protection and due process, balance of harms and public interests weighed in favor of preliminary injunction prohibiting enforcement of provision of Indiana law preventing recognition of same-sex marriages performed out of state as applied

--- F.Supp.2d ----, 2014 WL 1814064 (S.D.Ind.)
(Cite as: 2014 WL 1814064 (S.D.Ind.))

to lesbian couple; Indiana's laws regarding marriage were required to comply with constitutional guarantees, injunction sought would affect one couple in state with population of over 6.5 million people, and state could point to no specific instances of harm or confusion since temporary restraining order had been granted. U.S.C.A. Const.Amend. 14; West's A.I.C § 31–11–1–1(b).

[15] Constitutional Law 92 3735

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)16 Families and Children
92k3735 k. In general. Most Cited Cases

Constitutional Law 92 3736

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)16 Families and Children
92k3736 k. Marriage and divorce in general. Most Cited Cases

Constitutional Law 92 4380

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)18 Families and Children
92k4380 k. In general. Most Cited Cases

Constitutional Law 92 4384

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)18 Families and Children
92k4383 Marital Relationship
92k4384 k. In general. Most Cited Cases

Marriage 253 2

253 Marriage
253k2 k. Power to regulate and control. Most Cited Cases

Marriage and domestic relations are traditionally left to the states, but the restrictions put in place by a state must comply with the Fourteenth Amendment guarantees of equal protection of the laws and due process; the state does not have a valid interest in upholding and applying a law that violates these constitutional guarantees. U.S.C.A. Const.Amend. 14.

West Codenotes
Validity Called into DoubtWest's A.I.C § 31–11–1–1(b). Barbara J. Baird, The Law Office of Barbara J. Baird, Indianapolis, IN, Brent Phillip Ray, Jordan Heinz, Kirkland & Ellis LLP, Camilla B. Taylor, Christopher R. Clark, Lambda Legal Defense and Education Fund, Inc., Chicago, IL, Paul D. Castillo, Lambda Legal Defense and Education Fund, Inc., Dallas, TX, for Plaintiffs.

Robert V. Clutter, Kirtley, Taylor, Sims, Chadd & Minnette, P.C., Lebanon, IN, John S. Dull, Law Office of John S. Dull, PC, Merrillville, IN, Nancy Moore Tiller, Nancy Moore Tiller & Associates, Crown Point, IN, Thomas M. Fisher, Office of the Attorney General, Indianapolis, IN, Darren J. Murphy, Howard & Associates, Noblesville, IN, Elizabeth A. Knight, Valparaiso, IN, for Defendants.

ENTRY ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

RICHARD L. YOUNG, Chief Judge.

***1** Plaintiffs, Amy Sandler (“Amy”), Nikole

("Niki") Quasney, A.Q.-S. and M.Q.-S asked this court to grant them a temporary restraining order ("TRO") and a preliminary injunction requiring the State of Indiana to recognize the out-of-state marriage of Amy and Niki. (Filing No. 31). The court granted the TRO, which expires on May 8, 2014. (Filing No. 44; Filing No. 51). On May 2, 2014, the court held a hearing on the pending motions for summary judgment and preliminary injunction. For the reasons set forth below, the court **GRANTS** Plaintiffs' motion for a preliminary injunction.

I. Background

Niki and Amy have been in a loving and committed relationship for more than thirteen years. (Declaration of Nikole Quasney ("Quasney Dec.") ¶ 2, Filing No. 32–2). They are the parents to two very young children, Plaintiffs, A.Q.-S. and M.Q.-S. (*Id.* at ¶ 2). On June 7, 2011, Amy and Niki entered into a civil union in Illinois, and on August 29, 2013, they were legally married in Massachusetts. (*Id.* at ¶ 3).

In late May of 2009, Niki was diagnosed with Stage IV Ovarian cancer, which has a probable survival rate of five years. (*Id.* at ¶ 9). Since June 2009, Niki has endured several rounds of chemotherapy; yet, her cancer has progressed to the point where chemotherapy is no longer a viable option. Niki is receiving no further treatment; her death is imminent.

Niki and Amy joined the other Plaintiffs to this lawsuit to present a facial challenge to Indiana Code 31–11–1–1, titled "Same sex marriages prohibited" and states:

> (a) Only a female may marry a male. Only a male may marry a female.
>
> (b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.

Because Niki is fighting a fatal disease and is nearing the five year survival rate, she and Amy requested that the court issue a preliminary injunction preventing Indiana from enforcing Indiana Code § 31–11–1–1(b) as applied to them, and requiring the State of Indiana, through the Defendants, to recognize Niki as married to Amy on her death certificate.

II. Preliminary Injunction Standard

[1][2][3][4] A preliminary injunction "is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S.A., Inc.*, 549 F.3d 1079, 1085–86 (7th Cir.2008) (citations omitted). The court analyzes a motion for a preliminary injunction "in two distinct phases: a threshold phase and a balancing phase." *Id.* Under the threshold phase for preliminary injunctive relief, a plaintiff must establish—and has the ultimate burden of proving by a preponderance of the evidence—each of the following elements: (1) some likelihood of success on the merits, (2) absent a preliminary injunction, she will suffer irreparable harm, and (3) traditional legal remedies would be inadequate. *Id.* at 1086. To satisfy the first requirement, a plaintiff's chance of success must be more than negligible. *See Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir.1986).

***2** [5][6][7] "If the court determines that the moving party has failed to demonstrate any one of these [ ] threshold requirements, it must deny the injunction." *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1086 (citation omitted). If, on the other hand, the court determines the moving party has satisfied the threshold phase, the court then proceeds to the balancing phase of the analysis. *Id.* The balancing phase requires the court to balance the harm to the moving party if the injunction is denied against the harm to the nonmoving party if the injunction is granted. *Id.* In so doing, the court utilizes what is known as the sliding scale approach; "the more likely the [movant] will succeed on the merits, the less the balance of irrepa-

rable harms need favor the [movant's] position." *Id.* Additionally, this stage requires the court to consider "any effects that granting or denying the preliminary injunction would have on nonparties (something courts have termed the 'public interest')." *Id.*

III. Discussion

Before reaching the merits, Defendants pose two challenges that the court must initially address. First, they argue the Plaintiffs, Niki and Amy, lack standing to assert preliminary injunctive relief. Second, in light of the Supreme Court's recent decision in *Herbert v. Kitchen*, —— U.S. ——, 134 S.Ct. 893, 187 L.Ed.2d 699 (2014), they argue preliminary injunctive relief is inappropriate.

A. Standing

[8] To have standing a plaintiff "must present an injury that is concrete, particularized, and actual or imminent, fairly traceable to the defendant's challenged behavior, and likely to be redressed by a favorable ruling." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008). Defendants argue that the harms alleged by Plaintiffs as arising from Indiana's non-recognition statute are not concrete and particularized, nor fairly traceable to them. Thus, according to Defendants, a preliminary injunction cannot favorably address Plaintiffs' harms.

[9] The Defendants in this case, the Attorney General; the County Clerks from Boone, Porter, Lake, and Hamilton Counties; and the Commissioner of the Indiana Department of Health, are statutorily required to enforce Indiana Code § 31–11–1–1 by not recognizing the marriage. *See* Ind.Code § 4–6–1–6; *see also* Ind.Code § 31–11–4–2; *see also* Ind.Code § 16–37–1–3 and Ind.Code § 16–37–1–3.1. The injury to Plaintiffs resulting from Indiana's non-recognition statute harms the Plaintiffs in numerous tangible and intangible ways, including causing Niki to drive to Illinois where her marriage will be recognized in order to receive medical care and the dignity of marital status. Thus, a preliminary injunction enjoining Defendants from enforcing the non-recognition statute against Plaintiffs will, therefore, redress their claimed injury. Therefore, the court finds that the Plaintiffs have standing to seek a preliminary injunction.

B. Is preliminary injunctive relief appropriate?

***3** Citing *Herbert v. Kitchen*, Defendants contend that Plaintiffs' demands for preliminary relief are inappropriate under Federal Rule of Civil Procedure 65. *Herbert v. Kitchen*, —— U.S. ——, 134 S.Ct. 893, 187 L.Ed.2d 699 (2014). In that case, the Supreme Court issued a stay of the District of Utah's permanent injunction requiring officials to issue marriage licenses to same-sex couples and to recognize all same-sex marriages performed in other states. Since that ruling, all decisions by federal district courts have been stayed while the requisite preliminary and permanent injunctions are appealed to the respective circuit courts.

Nevertheless, the court does not interpret the fact that the other federal courts are staying injunctions to mean that preliminary injunctive relief is inappropriate in this case. Nor does the court agree that a stay by the Supreme Court of such a broad injunction conclusively determines that the Plaintiffs here are not entitled to the narrow form of injunctive relief they seek. Additionally, despite these stays, no court has found that preliminary injunctive relief is inappropriate simply because a stay may be issued. Therefore, the court finds that preliminary injunctive relief is still appropriate in this matter and proceeds to that analysis.

C. Is there a likelihood of success on the merits?

Plaintiffs argue that Indiana's statute prohibiting the recognition of same-sex marriages and in fact, voiding such marriages, violates the Fourteenth Amendments Due Process Clause and Equal Protection Clause.

1. Equal Protection Clause

[10] Plaintiffs argue that Indiana's non-recognition statute, codified at Indiana Code § 31–11–1–1(b), which provides that their state-sanctioned out-of-state marriage will not be recognized in Indiana and is indeed, void in Indiana, deprives them of equal protection. The Equal Protection Clause commands that no state shall deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

The theory underlying Plaintiffs' claim is the notion that Indiana denies same-sex couples the same equal rights, responsibilities and benefits that heterosexual couples receive through "traditional marriage" to Defendants, the State's interest in traditional marriage is to encourage heterosexual couples to stay together for the sake of any unintended children that their sexual relationship may produce, and to raise those children in a household with both male and female role models. The State views heterosexual couples who, for whatever reason, are not capable of producing children, to further the state's interest in being good male-female role models.

In the wake of the Supreme Court's decision in *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), district courts from around the country have rejected the idea that a state's non-recognition statute bears a rational relation to the state's interest in traditional marriage as a means to foster responsible procreation and rear those children in a stable male-female household. *See Tanco v. Haslam,* —— F.Supp.2d at ——, 2014 WL 997525 at *6 (M.D.Tenn. March 14, 2014); *see also Bishop v. U.S. ex rel. Holder,* 962 F.Supp.2d 1252 (N.D.Okla.2014) (finding there is no rational link between excluding same-sex marriages and "steering 'naturally procreative' relationships into marriage, in order to reduce the number of children born out of wedlock and reduce economic burdens on the State"); *see also DeBoer v. Snyder,* 973 F.Supp.2d 757, 771 (E.D.Mich.2014) (noting that prohibiting same-sex marriages "does not stop [gay men and lesbian women] from forming families and raising children"). Indeed, as the court found in its prior Entry, with the wave of persuasive cases supporting Plaintiffs' position, there is a reasonable likelihood that the Plaintiffs will prevail on the merits, even under the highly-deferential rational basis standard of review. *See Henry,* —— F.Supp.2d at —— – ——, 2014 WL 1418395 at **1–2 (noting that since the Supreme Court's ruling in *Windsor,* all federal district courts have declared unconstitutional and enjoined similar bans); *see also Tanco,* —— F.Supp.2d at ——, 2014 WL 997525 at *6 ("in light of the rising tide of persuasive post- *Windsor* federal case law, it is no leap to conclude that the plaintiffs here are likely to succeed in their challenge.") The reasons advanced by the State in support of Indiana's non-recognition statute do not distinguish this case from the district court cases cited above.

***4** The court is not persuaded that, at this stage, Indiana's anti-recognition law will suffer a different fate than those around the country. Thus, the Plaintiffs have shown that they have a reasonable likelihood of success on the merits of their equal protection challenge, even under a rational basis standard of review. Therefore, the court at this stage does not need to determine whether sexual orientation discrimination merits a higher standard of constitutional review.

2. Due Process Clause

[11] Plaintiffs assert that they have a due process right to not be deprived of one's already-existing legal marriage and its attendant benefits and protections. *See Obergefell v. Wymyslo,* 962 F.Supp.2d 968, 978 (S.D.Ohio 2013) (finding that non-recognition invokes "the right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections."); *see also Henry v. Himes,* No. 1:14–cv–129, ——F.Supp.2d ——, ——, 2014 WL 1418395, *9 (S.D.Ohio Apr. 14, 2014) (applying intermediate scrutiny where Ohio is "intruding into fact erasing" the marriage relationship); *see also De*

Leon v. Perry, 975 F.Supp.2d 632, 662 (W.D.Tex.2014) (applying rational basis review and finding "that by declaring lawful same-sex marriages void and denying married couples the rights, responsibilities, and benefits of marriage, Texas denies same-sex couples who have been married in other states their due process").

Defendants counter that there is no due process right to have one's marriage recognized. According to Defendants, recognition of marriages from other states is only a matter of comity, not a matter of right. *See e.g.*, *Sclamberg v. Sclamberg*, 220 Ind. 209, 41 N.E.2d 801 (1942) (recognizing parties' concession that their marriage, performed in Russia, was void under Indiana law because they were uncle and niece). Defendants again stress that *Windsor* is a case merely about federalism and did not create a right under the Due Process Clause to have one's marriage recognized.

The court found in its prior ruling that as a general rule, Indiana recognizes those marriages performed out of state. *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250, 254 (1951) ("[t]he validity of a marriage depends upon the law of the place where it occurs."). This includes recognizing marriages between first cousins despite the fact that they cannot marry in Indiana. *See Mason v. Mason*, 775 N.E.2d 706, 709 (Ind.Ct.App.2002). Indiana's non-recognition of Plaintiffs' marriage is a departure from the traditional rule in Indiana. Furthermore, the court notes that by declaring these marriages void, the State of Indiana may be depriving Plaintiffs of their liberty without due process of law. *See e.g. Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) ("to deny this fundamental freedom on so unsupportable a basis as the racial classification embodied in these statutes, ... is surely to deprive all of the State's citizens of liberty without due process of law.") Therefore, the court finds that Plaintiffs have shown some likelihood of success on this claim.

D. Are any injuries to Plaintiffs irreparable?

***5** [12] "Irreparable harm is harm which cannot be repaired, retrieved, put down again, atoned for.... [T]he injury must be of a particular nature, so that compensation in money cannot atone for it." *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 296 (7th Cir.1997) (internal quotation and citation omitted). Defendants first argue that there is not irreparable harm here, because Plaintiffs have endured these injuries for a substantial period of time. *See Celebration Int'l, Inc. v. Chosun Int'l, Inc.*, 234 F.Supp.2d 905, 920 (S.D.Ind.2002) (Though not dispositive, "tardiness weighs against a plaintiff's claim of irreparable harm...."). The court does not find that the requested relief is tardy for two reasons: (1) there has been a recent, substantial change in the law, and (2) in June 2014, Niki will have reached the average survival rate for her disease.

[13] Defendants challenge the Plaintiffs' claim and this court's prior finding that the constitutional injury alleged herein is sufficient evidence of irreparable harm. In support, Defendants rely on cases decided in other circuits. These cases are not binding on this court, but merely persuasive. After a more thorough review of the cases in the Seventh Circuit, the court reaffirms its conclusion that a constitutional violation, like the one alleged here, is indeed irreparable harm for purposes of preliminary injunctive relief. *See Preston v. Thompson*, 589 F.2d 300, 303 n. 3 (7th Cir.1978) ("[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm."); *see Does v. City of Indianapolis*, No. 1:06–cv–865–RLY–WTL, 2006 WL 2927598, *11 (S.D.Ind. Oct. 5, 2006) (quoting *Cohen v. Coahoma Cnty., Miss.*, 805 F.Supp. 398, 406 (N.D.Miss.1992) for the proposition that "[i]t has been repeatedly recognized by federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law."); *see also Back v. Carter*, 933 F.Supp. 738, 754 (N.D.Ind.1996) ("When violations of constitutional rights are alleged, further showing of irreparable injury may not be required if what is at stake

is not monetary damages. This rule is based on the belief that equal protection rights are so fundamental to our society that any violation of those rights causes irreparable harm."); *see also Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir.2011) (finding irreparable harm when Plaintiffs' Second Amendment rights were likely violated); *see also Hodgkins v. Peterson*, No. 1:04–cv–569–JDT–TAB, 2004 WL 1854194, *5 (S.D.Ind. Jul. 23, 2004) (granting a preliminary injunction enjoining enforcement of Indianapolis' curfew law as it likely violated the parents' due process rights and finding that "when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary".)

Even if a further showing of irreparable harm is required, the court finds that Plaintiffs have met this burden. Niki suffers irreparable harm as she drives to Illinois to receive treatment at a hospital where her marriage will be recognized. In addition, Niki may pass away without enjoying the dignity that official marriage status confers. *See Obergefell v. Kasich*, No. 1:13–cv–501, 2013 WL 3814262, *7 (S.D.Ohio Jul. 22, 2013) ("Dying with an incorrect death certificate that prohibits Mr. Arthur from being buried with dignity constitutes irreparable harm. Furthermore, Mr. Arthur's harm is irreparable because his injury is present now, while he is alive. A later decision allowing an amendment to the death certificate cannot remediate the harm to Mr. Arthur, as he will have passed away."); *see also Gray v. Orr*, —— F.Supp.2d ——, 2013 WL 6355918 (N.D.Ill.Dec. 5, 2013) ("Equally, if not more, compelling is Plaintiffs' argument that without temporary relief, they will also be deprived of enjoying less tangible but nonetheless significant personal and emotional benefits that the dignity of official marriage status confers."). These are concrete, tangible injuries that are fairly traceable to Defendants and can be remedied by a preliminary injunction.

E. Balance of Harms and Public Interest

***6** [14] Having satisfied the threshold phase of a preliminary injunction, the court now turns to the balancing phase. Plaintiffs assert that Defendants have not suffered and will not suffer irreparable harm from this preliminary injunction, and that the public interest is served by a preliminary injunction because there is no interest in upholding unconstitutional laws. Defendants counter that while they can point to no specific instances of harm or confusion since the court granted the TRO three weeks ago, the State is harmed in the abstract by not being able to enforce this law uniformly and against Plaintiffs. Defendants argue that the public interest weighs in their favor because (1) the State has a compelling interest in defining marriage and administering its own marriage laws, and (2) the continuity of Indiana's marriage laws avoids potential confusion over a series of injunctions.

[15] As the court has recognized before, marriage and domestic relations are traditionally left to the states; however, the restrictions put in place by the state must comply with the United States Constitution's guarantees of equal protection of the laws and due process. *See Windsor*, 133 S.Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967)). The State does not have a valid interest in upholding and applying a law that violates these constitutional guarantees. *See Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir.2004). Although the court recognizes the State's concern that injunctions of this sort will cause confusion with the administration of Indiana's marriage laws and to the public in general, that concern does not apply here.[FN1] The court is faced with one injunction affecting one couple in a State with a population of over 6.5 million people. This will not disrupt the public understanding of Indiana's marriage laws.

IV. Conclusion

The court finds that the Plaintiffs, Amy, Niki, A.Q–S., and M.Q.-S., have satisfied their burden for a preliminary injunction. They have shown a reasonable likelihood of success on the merits, irreparable harm with no adequate remedy at law, that the public in-

terest is in favor of the relief, and the balance of harm weighs in their favor. Therefore, the court **GRANTS** Plaintiffs' motion for a preliminary injunction (Filing No. 31).

Defendants and all those acting in concert are **ENJOINED** from enforcing Indiana statute § 31–11–1–1(b) against recognition of Plaintiffs', Niki Quasney's and Amy Sandler's, valid out-of-state marriage; the State of Indiana must recognize their marriage. In addition, should Niki pass away in Indiana, the court orders William C. VanNess II, M.D., in his official capacity as the Commissioner of the Indiana State Department of Health and all those acting in concert, to issue a death certificate that records her marital status as "married" and lists Plaintiff Amy Sandler as the "surviving spouse." This order shall require that Defendant VanNess issue directives to local health departments, funeral homes, physicians, coroners, medical examiners, and others who may assist with the completion of said death certificate explaining their duties under the order of this court. This preliminary injunction will remain in force until the court renders judgment on the merits of the Plaintiffs' claims.

***7** In conclusion, the court recognizes that the issues with which it is confronted are highly contentious and provoke strong emotions both in favor and against same-sex marriages. The court's ruling today is not a final resolution of the merits of the case—it is a preliminary look, or in other words, a best guess by the court as to what the outcome will be. Currently, all federal district court cases decided post- *Windsor* indicate that Plaintiffs are likely to prevail. Nevertheless, the strength or weakness of Plaintiffs' case at the time of final dissolution will inevitably be impacted as more courts are presented with this issue.

FN1. This argument had more strength when all of the Plaintiffs in the present lawsuit were seeking preliminary injunctive relief, because they (as opposed to Niki and Amy) were never married, and challenged the constitutionality of Indiana's traditional marriage law. The motion for preliminary injunctive relief from the unmarried Plaintiffs (Filing No. 35) is **WITHDRAWN;** therefore, the court does not see the potential of creating great confusion from the court's grant of the present motion which affects only one couple. Should this injunction be reversed or a permanent injunction not issued at a later time, only the parties to this case may suffer from confusion. The court has faith that their respective attorneys can explain any decisions and effects from those decisions to them.

S.D.Ind.,2014.
Baskin v. Bogan
--- F.Supp.2d ----, 2014 WL 1814064 (S.D.Ind.)

END OF DOCUMENT

--- F.Supp.2d ----, 2014 WL 556729 (W.D.Ky.)
(Cite as: 2014 WL 556729 (W.D.Ky.))

H

Only the Westlaw citation is currently available.

United States District Court, W.D. Kentucky,
at Louisiville.
Gregory BOURKE, et al., Plaintiffs
v.
Steve BESHEAR, et al., Defendants.

Civil Action No. 3:13–CV–750–H.
Signed Feb. 12, 2014.
Opinion Continuing Stay March 19, 2014.

Background: Four same-sex couples validly married outside Kentucky brought § 1983 action challenging constitutionality of Kentucky's denial of recognition for valid same-sex marriages.

Holdings: The District Court, John G. Heyburn II, J., held that:
(1) rational basis review applied;
(2) Kentucky's failure to recognize marriages of same-sex couples validly married outside of Kentucky treated gay and lesbian persons differently in a way that demeaned them; and
(3) Kentucky's interest in preserving "state's institution of traditional marriage," standing alone, was not rational basis.

Judgment for plaintiffs.

West Headnotes

[1] Constitutional Law 92 3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and Civil Unions. Most Cited Cases

Rational basis review applied in § 1983 action by same-sex couples validly married outside Kentucky, alleging Kentucky's denial of recognition for their marriages violated Fourteenth Amendment equal protection. U.S.C.A. Const.Amend. 14; Ky. Const. § 233A; 42 U.S.C.A. § 1983; KRS 402.005, 402.020(1)(d), 402.040(2), 402.045.

[2] Constitutional Law 92 3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and Civil Unions. Most Cited Cases

Marriage 253 2

253 Marriage
253k2 k. Power to Regulate and Control. Most Cited Cases

Marriage 253 17.5(2)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(2) k. Effect of Foreign Union. Most Cited Cases

Kentucky's failure to recognize marriages of same-sex couples validly married outside of Kentucky treated gay and lesbian persons differently in a way

that demeaned them, for purposes of § 1983 action by same-sex couples, alleging violations of Fourteenth Amendment equal protection; Kentucky law identified subset of marriages and made them unequal, and law burdened same-sex spouses by preventing them from receiving certain state and federal benefits afforded to other married couples. U.S.C.A. Const.Amend. 14; Ky. Const. § 233A; 42 U.S.C.A. § 1983; KRS 402.005, 402.020(1)(d), 402.040(2), 402.045.

[3] Constitutional Law 92 3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and Civil Unions. Most Cited Cases

Marriage 253 2

253 Marriage
253k2 k. Power to Regulate and Control. Most Cited Cases

Marriage 253 17.5(2)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(2) k. Effect of Foreign Union. Most Cited Cases

Kentucky's interest in preserving "state's institution of traditional marriage," standing alone, was not rational basis required to justify state's failure to recognize marriages of same-sex couples validly married outside of Kentucky, and, therefore, those provisions of Kentucky law were unconstitutional as in violation of Fourteenth Amendment equal protection; that governing majority traditionally viewed practice as immoral was not sufficient reason for upholding laws prohibiting that practice. U.S.C.A. Const.Amend. 14; Ky. Const. § 233A; KRS 402.005, 402.020(1)(d), 402.040(2), 402.045.

[4] Constitutional Law 92 2450

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2450 k. Nature and Scope in General. Most Cited Cases

It is emphatically the province and duty of the judicial department to say what the law is.

[5] Federal Courts 170B 3463

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(F) Supersedeas or Stay of Proceedings
170Bk3463 k. Other Particular Cases. Most Cited Cases

Order overturning Kentucky's denial of recognition of valid same-sex marriages performed outside Kentucky would be stayed pending appeal to the Court of Appeals; implementing the order would have dramatic effects, and risk confusion if it were later reversed. Fed.Rules Civ.Proc.Rule 62, 28 U.S.C.A.

[6] Federal Courts 170B 3461

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(F) Supersedeas or Stay of Proceedings
170Bk3461 k. In General. Most Cited Cases

In determining whether to stay its own judgment or order, the court will consider the following factors: (1) whether the stay applicant has made a strong showing of likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of a stay will substantially injure other parties interested in the proceedings; and (4) where the public interest lies. Fed.Rules Civ.Proc.Rule 62, 28 U.S.C.A.

[7] Federal Courts 170B 3461

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(F) Supersedeas or Stay of Proceedings
170Bk3461 k. In General. Most Cited Cases

The loss of a constitutional right for even minimal periods of time constitutes irreparable harm, in determining whether to stay an order or judgment pending appeal. Fed.Rules Civ.Proc.Rule 62, 28 U.S.C.A.

West Codenotes
Held UnconstitutionalKy. Const. § 233A, KRS 402.005, 402.020(1)(d), 402.040(2), 402.045.Dawn R. Elliott, Fauver Law Office, Daniel J. Canon, Laura E. Landenwich, Leonard J. Dunman, IV, Louis Paz Winner, Clay Daniel Walton Adams PLC, Shannon Renee Fauver, Fauver Law Office, Louisville, KY, for Plaintiffs.

Brian Thomas Judy, Clay A. Barkley, Kentucky Attorney General—Civil & Environmental Law Div., Frankfort, KY, for Defendants.

MEMORANDUM OPINION

JOHN G. HEYBURN II, District Judge.

***1** Four same-sex couples validly married outside Kentucky have challenged the constitutionality of Kentucky's constitutional and statutory provisions that exclude them from the state recognition and benefits of marriage available to similarly situated opposite-sex couples.

While Kentucky unquestionably has the power to regulate the recognition of civil marriages, those regulations must comply with the Constitution of the United States. This court's role is not to impose its own political or policy judgments on the Commonwealth or its people. Nor is it to question the importance and dignity of the institution of marriage as many see it. Rather, it is to discuss the benefits and privileges that Kentucky attaches to marital relationships and to determine whether it does so lawfully under our federal constitution.

From a constitutional perspective, the question here is whether Kentucky can justifiably deny same-sex spouses the recognition and attendant benefits it currently awards opposite-sex spouses. For those not trained in legal discourse, the questions may be less logical and more emotional. They concern issues of faith, beliefs, and traditions. Our Constitution was designed both to protect religious beliefs and prevent unlawful government discrimination based upon them. The Court will address all of these issues.

In the end, the Court concludes that Kentucky's denial of recognition for valid same-sex marriages violates the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review. Accordingly, Kentucky's statutes and constitutional amendment that mandate this denial are unconstitutional.

I.

No case of such magnitude arrives absent important history and narrative. That narrative necessarily discusses (1) society's evolution on these issues, (2) a look at those who now demand their constitutional rights, and (3) an explication of their claims. For

most of Kentucky's history, the limitation of marriage to opposite-sex couples was assumed and unchallenged. Those who might have disagreed did so in silence. But gradual changes in our society, political culture and constitutional understandings have encouraged some to step forward and assert their rights.

A.

In 1972, two Kentucky women stepped forward to apply for a marriage license. The Kentucky Supreme Court ruled that they were not entitled to one, noting that Kentucky statutes included neither a definition of "marriage" nor a prohibition on same-sex marriage. *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky.App.1973). The court defined "marriage" according to common usage, consulting several dictionaries. It held that no constitutional issue was involved and concluded, "In substance, the relationship proposed ... is not a marriage." *Id.* at 590. This view was entirely consistent with the then-prevailing state and federal jurisprudence. *See Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 187 (1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972); *Anonymous v. Anonymous*, 67 Misc.2d 982, 325 N.Y.S.2d 499, 501 (N.Y.Spec. Term 1971). A lot has changed since then.

Twenty-one long years later, the Hawaii Supreme Court first opened the door to same-sex marriage. *See Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44, 61 (1993) (ruling that the state's prohibition on same-sex marriage was discriminatory under the Hawaii Constitution and remanding to allow the state to justify its position). The reaction was immediate and visceral. In the next few years, twenty-seven states passed anti-same-sex marriage legislation, [FN1] and Congress passed the Defense of Marriage Act (DOMA).[FN2]

***2** In 1998, Kentucky became one of those states, enacting new statutory provisions that (1) defined marriage as between one man and one woman, K.R.S. § 402.005; (2) prohibited marriage between members of the same sex, K.R.S. § 402.020(1)(d); (3) declared same-sex marriages contrary to Kentucky public policy, K.R.S. § 402.040(2); and (4) declared same-sex marriages solemnized out of state void and the accompanying rights unenforceable, K.R.S. § 402.045.[FN3]

Five years later, the Massachusetts Supreme Judicial Court declared that the state's own ban on same-sex marriage violated their state constitution. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941, 969 (2003). In May 2004, Massachusetts began marrying same-sex couples. In response, anti-same-sex marriage advocates in many states initiated campaigns to enact constitutional amendments to protect "traditional marriage." [FN4]

Like-minded Kentuckians began a similar campaign, arguing that although state law already prohibited same-sex marriage, a constitutional amendment would foreclose any possibility that a future court ruling would allow same-sex marriages to be performed or recognized in Kentucky. *See* S. DEBATE, 108TH CONG., 2ND SESS. (Ky. 2004), ECF No. 38–6. The legislature placed such an amendment on the ballot. It contained only two sentences:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

KY. CONST. § 233A. Consequently, the amendment and Kentucky's statutes have much the same effect. On November 2, 2004, approximately 74% of participating voters approved the Amendment.[FN5]

Kentucky's same-sex marriage legal framework has not changed since. In the last decade, however, a virtual tidal wave of legislative enactments and judi-

cial judgments in other states have repealed, invalidated, or otherwise abrogated state laws restricting same-sex couples' access to marriage and marriage recognition.[FN6]

B.

In many respects, Plaintiffs here are average, stable American families.

Gregory Bourke and Michael Deleon reside in Louisville, Kentucky and have been together for 31 years. They were lawfully married in Ontario, Canada in 2004 and have two minor children who are also named Plaintiffs: a 14–year–old girl; and a 15–year–old boy. Jimmy Meade and Luther Barlowe reside in Bardstown, Kentucky and have been together 44 years. They were lawfully married in Davenport, Iowa in 2009. Randell Johnson and Paul Campion reside in Louisville, Kentucky and have been together for 22 years. They were lawfully married in Riverside, California in 2008 and have four minor children who are named Plaintiffs: twin 18–year–old boys; a 14–year–old boy; and a 10–year–old girl. Kimberly Franklin and Tamera Boyd reside in Cropper, Kentucky.[FN7] They were lawfully married in Stratford, Connecticut in 2010.

Collectively, they assert that Kentucky's legal framework denies them certain rights and benefits that validly married opposite-sex couples enjoy. For instance, a same-sex surviving spouse has no right to an inheritance tax exemption and thus must pay higher death taxes. They are not entitled to the same healthcare benefits as opposite-sex couples; a same-sex spouse must pay to add their spouse to their employer-provided health insurance, while opposite-sex spouses can elect this option free of charge. Same-sex spouses and their children are excluded from intestacy laws governing the disposition of estate assets upon death. Same-sex spouses and their children are precluded from recovering loss of consortium damages in civil litigation following a wrongful death. Under Kentucky's workers compensation law, same-sex spouses have no legal standing to sue and recover as a result of their spouse's fatal workplace injury.

***3** Moreover, certain federal protections are available only to couples whose marriage is legally recognized by their home state. For example, a same-sex spouse in Kentucky cannot take time off work to care for a sick spouse under the Family Medical Leave Act. 29 C.F.R. § 825.122(b). In addition, a same-sex spouse in Kentucky is denied access to a spouse's social security benefits. 42 U.S.C. § 416(h)(1)(A)(i). No one denies these disparities.

Finally, Plaintiffs assert additional non-economic injuries as well. They say that Kentucky's laws deny them "a dignity and status of immense import," stigmatize them, and deny them the stabilizing effects of marriage that helps keep couples together. Plaintiffs also allege injuries to their children including: (1) a reduction in family resources due to the State's differential treatment of their parents, (2) stigmatization resulting from the denial of social recognition and respect, (3) humiliation, and (4) harm from only one parent being able to be listed as an adoptive parent—the other being merely their legal guardian.

C.

Plaintiffs advance six primary claims under 42 U.S.C. § 1983:(1) deprivation of the fundamental right to marry in violation of the Due Process Clause of the Fourteenth Amendment; (2) discrimination on the basis of sexual orientation in violation of the Equal Protection Clause of the Fourteenth Amendment; [FN8] (3) discrimination against same-sex couples in violation of the freedom of association guaranteed by the First Amendment; (4) failure to recognize valid public records of other states in violation of the Full Faith and Credit Clause of Article IV, Section 1; (5) deprivation of the right to travel in violation of the Due Process Clause of the Fourteenth Amendment; and (6) establishment of a religious definition of marriage in violation of the Establishment Clause of the First

Amendment.[FN9] Plaintiffs seek an order enjoining the State from enforcing the pertinent constitutional and statutory provisions.

While Plaintiffs have many constitutional theories, the Fourteenth Amendment's Equal Protection Clause provides the most appropriate analytical framework. [FN10] If equal protection analysis decides this case, the Court need not address any others. No one disputes that the same-sex couples who have brought this case are treated differently under Kentucky law than those in comparable opposite-sex marriages. No one seems to disagree that, as presented here, the equal protection issue is purely a question of law. The Court must decide whether the Kentucky Constitution and statutes violate Plaintiffs' federal constitutional rights.

II.

***4** [1] Before addressing the substance of equal protection analysis, the Court must first determine the applicable standard of review. Rational basis review applies unless Kentucky's laws affect a suspect class of individuals or significantly interfere with a fundamental right. *Zablocki v. Redhail,* 434 U.S. 374, 388, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978).

A.

The Kentucky provisions challenged here impose a classification based on sexual orientation. Barely seven months ago, the Supreme Court issued a historic opinion applying equal protection analysis to federal non-recognition of same-sex marriages. *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013).[FN11] Although the majority opinion covered many topics, it never clearly explained the applicable standard of review. Some of Justice Kennedy's language corresponded to rational basis review. *See id.* at 2696 ("no legitimate purpose overcomes the purpose and effect to disparage and to injure...."). However, the scrutiny that the Court actually applied does not so much resemble it. *See id.* at 2706 (Scalia, J., dissenting) (the majority "does not apply strict scrutiny, and [although] its central propositions are taken from rational basis cases ... the Court certainly does not *apply* anything that resembles that deferential framework.") (emphasis in original). So, we are left without a clear answer.

The Sixth Circuit has said that sexual orientation is not a suspect classification and thus is not subject to heightened scrutiny. *Davis v. Prison Health Servs.,* 679 F.3d 433, 438 (6th Cir.2012) (citing *Scarbrough v. Morgan Cnty. Bd. of Educ.,* 470 F.3d 250, 261 (6th Cir.2006)). Though *Davis* concerned slightly different circumstances, it would seem to limit the Court's independent assessment of the question. *Accord Bassett v. Snyder,* 951 F.Supp.2d 939, 961 (E.D.Mich.2013).

It would be no surprise, however, were the Sixth Circuit to reconsider its view. Several theories support heightened review. *Davis* based its decision on a line of cases relying on *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), which has since been overruled by *Lawrence v. Texas,* 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today.").[FN12] Recently, several courts, including the Ninth Circuit, have held that classifications based on sexual orientation are subject to heightened scrutiny. *See SmithKline Beecham Corp. v. Abbott Labs.,* 740 F.3d 471, 483 (9th Cir.2014) (finding that *Windsor* employed heightened scrutiny).

Moreover, a number of reasons suggest that gay and lesbian individuals do constitute a suspect class. They seem to share many characteristics of other groups that are afforded heightened scrutiny, such as historical discrimination, immutable or distinguishing characteristics that define them as a discrete group, and relative political powerlessness. *See Lyng v. Castillo,* 477 U.S. 635, 638, 106 S.Ct. 2727, 91 L.Ed.2d 527 (1986). Further, their common characteristic does not impair their ability to contribute to society. *See City of Cleburne, Tex. v. Cleburne Living Ctr.,* 473 U.S. 432, 440–41, 105 S.Ct. 3249, 87 L.Ed.2d 313

(1985).

***5** All of these arguments have merit. To resolve the issue, however, the Court must look to *Windsor* and the Sixth Circuit. In *Windsor,* no clear majority of Justices stated that sexual orientation was a suspect category.

B.

Supreme Court jurisprudence suggests that the right to marry is a fundamental right. *See Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our existence and survival" (quoting *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942))); *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (the right to marry is a central part of Due Process liberty); *Maynard v. Hill,* 125 U.S. 190, 205, 8 S.Ct. 723, 31 L.Ed. 654 (1888) (marriage creates "the most important relation in life"). The right to marry also implicates the right to privacy and the right to freedom of association. *Griswold v. Connecticut,* 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (marriage involves a "right of privacy older than the Bill of Rights"); *M.L.B. v. S.L.J.,* 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) ("Choices about marriage ... are among associational rights this Court has ranked 'of basic importance in our society' " and are protected under the Fourteenth Amendment (quoting *Boddie v. Connecticut,* 401 U.S. 371, 376, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971))).

Despite this comforting language, neither the Supreme Court nor the Sixth Circuit has stated that the fundamental right to marry includes a fundamental right to marry someone of the same sex. Moreover, Plaintiffs do not seek the right to marry in Kentucky. Rather, they challenge the State's lack of recognition for their validly solemnized marriages.[FN13]

To resolve the issue, the Court must again look to *Windsor.* In *Windsor,* the Supreme Court did not clearly state that the non-recognition of marriages under Section 3 of DOMA implicated a fundamental right, much less significantly interfered with one. Therefore, the Court will apply rational basis review. Ultimately, the result in this case is unaffected by the level of scrutiny applied.

C.

***6** Under this standard, the Court must determine whether these Kentucky laws are rationally related to a legitimate government purpose. Plaintiffs have the burden to prove either that there is no conceivable legitimate purpose for the law or that the means chosen to effectuate a legitimate purpose are not rationally related to that purpose. This standard is highly deferential to government activity but is surmountable, particularly in the context of discrimination based on sexual orientation. "Rational basis review, while deferential, is not 'toothless.' " *Peoples Rights Org., Inc. v. City of Columbus,* 152 F.3d 522, 532 (6th Cir.1998) (quoting *Mathews v. Lucas,* 427 U.S. 495, 510, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976)). This search for a rational relationship "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans,* 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Even under this most deferential standard of review, courts must still "insist on knowing the *relation* between the classification adopted and the object to be attained." *Id.* at 632, 116 S.Ct. 1620 (emphasis added).

III.

In a democracy, the majority routinely enacts its own moral judgments as laws. Kentucky's citizens have done so here. Whether enacted by a legislature or by public referendum, those laws are subject to the guarantees of individual liberties contained within the United States Constitution. *Windsor,* 133 S.Ct. at 2691; *see e.g., Loving,* 388 U.S. at 12, 87 S.Ct. 1817 (statute prohibiting interracial marriage violated equal protection).

Ultimately, the focus of the Court's attention must be upon Justice Kennedy's majority opinion in *Windsor.* While Justice Kennedy did not address our specific issue, he did address many others closely related. His reasoning about the legitimacy of laws excluding recognition of same-sex marriages is instructive. For the reasons that follow, the Court concludes that Kentucky's laws are unconstitutional.

A.

In *Windsor,* Justice Kennedy found that by treating same-sex married couples differently than opposite-sex married couples, Section 3 of DOMA "violate[d] basic due process and equal protection principles applicable to the Federal Government." *Windsor,* 133 S.Ct. at 2693. His reasoning establishes certain principles that strongly suggest the result here.[FN14]

[2] The first of those principles is that the actual purpose of Kentucky's laws is relevant to this analysis to the extent that their purpose and principal effect was to treat two groups differently. *Id.* As described so well by substituting our particular circumstances within Justice Kennedy's own words, that principle applies quite aptly here:

> [Kentucky's laws'] principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency.

***7** *Id.* at 2694. The legislative history of Kentucky's laws clearly demonstrates the intent to permanently prevent the recognition of same-sex marriage in Kentucky.[FN15] Whether that purpose also demonstrates an obvious animus against same-sex couples may be debatable. But those two motivations are often different sides of the same coin.

The second principle is that such an amendment demeans one group by depriving them of rights provided for others. As Justice Kennedy would say:

> Responsibilities, as well as rights, enhance the dignity and integrity of the person. And [Kentucky's laws] contrive[ ] to deprive some couples [married out of state], but not other couples [married out of state], of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, [Kentucky's laws] force[ ] same-sex couples to live as married for the purpose of [federal law] but unmarried for the purpose of [Kentucky] law.... This places same-sex couples [married out of state] in an unstable position of being in a second-tier marriage [in Kentucky]. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence,* 539 U.S. 558, 123 S.Ct. 2472.

Id. Under Justice Kennedy's logic, Kentucky's laws burden the lives of same-sex spouses by preventing them from receiving certain state and federal governmental benefits afforded to other married couples. *Id.* Those laws "instruct[ ] all ... officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696. Indeed, Justice Kennedy's analysis would seem to command that a law refusing to recognize valid out-of-state same-sex marriages has only one effect: to impose inequality.

From this analysis, it is clear that Kentucky's laws treat gay and lesbian persons differently in a way that demeans them. Absent a clear showing of animus, however, the Court must still search for any rational relation to a legitimate government purpose.

B.

[3] The State's sole justification for the challenged provisions is: "the Commonwealth's public policy is rationally related to the legitimate government interest

of preserving the state's institution of traditional marriage." Certainly, these laws do further that policy.

That Kentucky's laws are rooted in tradition, however, cannot alone justify their infringement on individual liberties. *See Heller v. Doe*, 509 U.S. 312, 326, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."); *Williams v. Illinois*, 399 U.S. 235, 239, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack...."). Over the past forty years, the Supreme Court has refused to allow mere tradition to justify marriage statutes that violate individual liberties. *See, e.g.*, *Loving*, 388 U.S. at 12, 87 S.Ct. 1817 (states cannot prohibit interracial marriage); *Lawrence*, 539 U.S. at 577–78, 123 S.Ct. 2472 (states cannot criminalize private, consensual sexual conduct); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 733–35, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (states cannot act based on stereotypes about women's assumption of primary childcare responsibility). Justice Kennedy restated the principle most clearly: " '[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice....' " *Lawrence*, 539 U.S. at 577, 123 S.Ct. 2472 (quoting *Bowers*, 478 U.S. at 216, 106 S.Ct. 2841 (Stevens, J., dissenting)). Justice Scalia was more blunt, stating that " 'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Id.* at 601, 123 S.Ct. 2472 (Scalia, J., dissenting) (emphasis in original).

Usually, as here, the tradition behind the challenged law began at a time when most people did not fully appreciate, much less articulate, the individual rights in question. For years, many states had a tradition of segregation and even articulated reasons why it created a better, more stable society. Similarly, many states deprived women of their equal rights under the law, believing this to properly preserve our traditions. In time, even the most strident supporters of these views understood that they could not enforce their particular moral views to the detriment of another's constitutional rights. Here as well, sometime in the not too distant future, the same understanding will come to pass.

C.

***8** The Family Trust Foundation of Kentucky, Inc. submitted a brief as *amicus curiae* which cast a broader net in search of reasons to justify Kentucky's laws. It offered additional purported legitimate interests including: responsible procreation and childrearing, steering naturally procreative relationships into stable unions, promoting the optimal childrearing environment, and proceeding with caution when considering changes in how the state defines marriage. These reasons comprise all those of which the Court might possibly conceive.

The State, not surprisingly, declined to offer these justifications, as each has failed rational basis review in every court to consider them post- *Windsor*, and most courts pre- *Windsor*. *See, e.g.*, *Bishop v. United States ex rel. Holder*, 962 F.Supp.2d 1252, 1290–96 (N.D.Okla.2014) (responsible procreation and childrearing, steering naturally procreative relationships into stable unions, promoting the ideal family unit, and avoiding changes to the institution of marriage and unintended consequences); *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1211–14 (D.Utah 2013) (responsible procreation, optimal childrearing, proceeding with caution); *Obergefell v. Wymyslo*, 962 F.Supp.2d 968, 993–95 (S.D.Ohio 2013) (optimal childrearing). The Court fails to see how having a family could conceivably harm children. Indeed, Justice Kennedy explained that it was the government's failure to recognize same-sex marriages that harmed children, not having married parents who happened to be of the same sex:

> [I]t humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.
>
> *Windsor*, 133 S.Ct. at 2694.

As in other cases that have rejected the amicus's arguments, no one in this case has offered factual or rational reasons why Kentucky's laws are rationally related to any of these purposes. Kentucky does not require proof of procreative ability to have an out-of-state marriage recognized. The exclusion of same-sex couples on procreation grounds makes just as little sense as excluding post-menopausal couples or infertile couples on procreation grounds. After all, Kentucky allows gay and lesbian individuals to adopt children. And no one has offered evidence that same-sex couples would be any less capable of raising children or any less faithful in their marriage vows. Compare this with Plaintiffs, who have not argued against the many merits of "traditional marriage." They argue only that they should be allowed to enjoy them also.

Other than those discussed above, the Court cannot conceive of any reasons for enacting the laws challenged here. Even if one were to conclude that Kentucky's laws do not show animus, they cannot withstand traditional rational basis review.

D.

***9** The Court is not alone in its assessment of the binding effects of Supreme Court jurisprudence, particularly Justice Kennedy's substantive analysis articulated over almost two decades.

Nine state and federal courts have reached conclusions similar to those of this Court. After the Massachusetts Supreme Judicial Court led the way by allowing same-sex couples to marry, five years later the Connecticut Supreme Court reached a similar conclusion regarding its state constitution on equal protection grounds. *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 957 A.2d 407, 482 (2008). Other courts soon began to follow. *See Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (holding that banning same-sex marriage violated equal protection as guaranteed by the Iowa Constitution); *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 1003 (N.D.Cal.2010) (holding that the state's constitutional ban on same-sex marriage enacted via popular referendum violated the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution) *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir.2012) *vacated and remanded sub nom. Hollingsworth v. Perry*, —— U.S. ——, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013); *Garden State Equality v. Dow*, 434 N.J.Super. 163, 82 A.3d 336, 367–68 (2013) (holding that disallowing same-sex marriage violated the New Jersey Constitution, and the governor withdrew the state's appeal); *Griego v. Oliver*, 316 P.3d 865, 872 (N.M.2013) (holding that denying same-sex couples the right to marry violated the state constitution's equal protection clause).

Over the last several months alone, three federal district courts have issued well-reasoned opinions supporting the rights of non-heterosexual persons to marriage equality in similar circumstances. *See Bishop*, 962 F.Supp.2d at 1258–59 (holding that the state's ban on same-sex marriage violated the Equal Protection Clause of the Fourteenth Amendment); *Obergefell*, 962 F.Supp.2d at 972–74 (holding that Ohio's constitutional and statutory ban on the recognition of same-sex marriages validly performed out-of-state was unconstitutional as applied to Ohio death certificates); *Kitchen*, 961 F.Supp.2d at 1187–88 (holding that the state's constitutional and statutory ban on same-sex marriage violated the Equal Protection and Due Process clause of the Fourteenth Amendment).

Indeed, to date, all federal courts that have considered same-sex marriage rights post- *Windsor* have ruled in favor of same-sex marriage rights. This Court joins in general agreement with their analyses.

IV.

***10** For many, a case involving these issues prompts some sincere questions and concerns. After all, recognizing same-sex marriage clashes with many accepted norms in Kentucky—both in society and faith. To the extent courts clash with what likely remains that majority opinion here, they risk some of the public's acceptance. For these reasons, the Court feels a special obligation to answer some of those concerns.

A.

Many Kentuckians believe in "traditional marriage." Many believe what their ministers and scriptures tell them: that a marriage is a sacrament instituted between God and a man and a woman for society's benefit. They may be confused—even angry—when a decision such as this one seems to call into question that view. These concerns are understandable and deserve an answer.

Our religious beliefs and societal traditions are vital to the fabric of society. Though each faith, minister, and individual can define marriage for themselves, at issue here are laws that act outside that protected sphere. Once the government defines marriage and attaches benefits to that definition, it must do so constitutionally. It cannot impose a traditional or faith-based limitation upon a public right without a sufficient justification for it. Assigning a religious or traditional rationale for a law, does not make it constitutional when that law discriminates against a class of people without other reasons.

The beauty of our Constitution is that it accommodates our individual faith's definition of marriage while preventing the government from unlawfully treating us differently. This is hardly surprising since it was written by people who came to America to find both freedom of religion and freedom from it.

B.

Many others may wonder about the future of marriages generally and the right of a religion or an individual church to set its own rules governing it. For instance, must Kentucky now allow same-sex couples to marry in this state? Must churches now marry same-sex couples? How will this decision change or affect my marriage?

First, the Court was not presented with the particular question whether Kentucky's ban on same-sex marriage is constitutional. However, there is no doubt that *Windsor* and this Court's analysis suggest a possible result to that question.

Second, allowing same-sex couples the state recognition, benefits, and obligations of marriage does not in any way diminish those enjoyed by opposite-sex married couples. No one has offered any evidence that recognizing same-sex marriages will harm opposite-sex marriages, individually or collectively. One's belief to the contrary, however sincerely held, cannot alone justify denying a selected group their constitutional rights.

Third, no court can require churches or other religious institutions to marry same-sex couples or any other couple, for that matter. This is part of our constitutional guarantee of freedom of religion. That decision will always be based on religious doctrine.

What this opinion does, however, is make real the promise of equal protection under the law. It will profoundly affect validly married same-sex couples' experience of living in the Commonwealth and elevate their marriage to an equal status in the eyes of state law.

C.

***11** Many people might assume that the citizens of a state by their own state constitution can establish the basic principles of governing their civil life. How can a single judge interfere with that right?

It is true that the citizens have wide latitude to codify their traditional and moral values into law. In fact, until after the Civil War, states had almost complete power to do so, unless they encroached on a specific federal power. *See Barron v. City of Baltimore*, 32 U.S. 243, 250–51, 7 Pet. 243, 8 L.Ed. 672 (1833). However, in 1868 our country adopted the Fourteenth Amendment, which prohibited state governments from infringing upon our individual rights. Over the years, the Supreme Court has said time and time again that this Amendment makes the vast majority of the original Bill of Rights and other fundamental rights applicable to state governments.

In fact, the first justice to articulate this view was one of Kentucky's most famous sons, Justice John Marshall Harlan. *See Hurtado v. California*, 110 U.S. 516, 558, 4 S.Ct. 111, 28 L.Ed. 232 (1884) (Harlan, J., dissenting). He wrote that the Fourteenth Amendment "added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that ... 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' " *Plessy v. Ferguson*, 163 U.S. 537, 555, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting) (quoting U.S. CONST. amend. XIV).

[4] So now, the Constitution, including its equal protection and due process clauses, protects all of us from government action at any level, whether in the form of an act by a high official, a state employee, a legislature, or a vote of the people adopting a constitutional amendment. As Chief Justice John Marshall said, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed. 60 (1803). Initially that decision typically rests with one judge; ultimately, other judges, including the justices of the Supreme Court, have the final say. That is the way of our Constitution.

D.

For many others, this decision could raise basic questions about our Constitution. For instance, are courts creating new rights? Are judges changing the meaning of the Fourteenth Amendment or our Constitution? Why is all this happening so suddenly?

The answer is that the right to equal protection of the laws is not new. History has already shown us that, while the Constitution itself does not change, our understanding of the meaning of its protections and structure evolves.[FN16] If this were not so, many practices that we now abhor would still exist.

***12** Contrary to how it may seem, there is nothing sudden about this result. The body of constitutional jurisprudence that serves as its foundation has evolved gradually over the past forty-seven years. The Supreme Court took its first step on this journey in 1967 when it decided the landmark case *Loving v. Virginia*, which declared that Virginia's refusal to marry mixed-race couples violated equal protection. The Court affirmed that even areas such as marriage, traditionally reserved to the states, are subject to constitutional scrutiny and "must respect the constitutional rights of persons." *Windsor*, 133 S.Ct. at 2691 (citing *Loving*).

Years later, in 1996, Justice Kennedy first emerged as the Court's swing vote and leading explicator of these issues in *Romer v. Evans. Romer*, 517 U.S. at 635, 116 S.Ct. 1620 (holding that Colorado's constitutional amendment prohibiting all legislative, executive, or judicial action designed to protect homosexual persons violated the Equal Protection

Clause). He explained that if the " 'constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.' " *Id.* at 634–35, 116 S.Ct. 1620 (emphasis in original) (quoting *Dep't of Agric. v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973)). These two cases were the virtual roadmaps for the cases to come next.

In 2003, Justice Kennedy, again writing for the majority, addressed another facet of the same issue in *Lawrence v. Texas,* explaining that sexual relations are "but one element in a personal bond that is more enduring" and holding that a Texas statute criminalizing certain sexual conduct between persons of the same sex violated the Constitution. 539 U.S. at 567, 123 S.Ct. 2472. Ten years later came *Windsor.* And, sometime in the next few years at least one other Supreme Court opinion will likely complete this judicial journey.

So, as one can readily see, judicial thinking on this issue has evolved ever so slowly. That is because courts usually answer only the questions that come before it. Judge Oliver Wendell Holmes aptly described this process: "[J]udges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *S. Pac. Co. v. Jensen,* 244 U.S. 205, 221, 37 S.Ct. 524, 61 L.Ed. 1086 (1917) (Holmes, J., dissenting). In *Romer, Lawrence,* and finally, *Windsor,* the Supreme Court has moved interstitially, as Holmes said it should, establishing the framework of cases from which district judges now draw wisdom and inspiration. Each of these small steps has led to this place and this time, where the right of same-sex spouses to the state-conferred benefits of marriage is virtually compelled.

The Court will enter an order consistent with this Memorandum Opinion.

MEMORANDUM OPINION AND ORDER

***13** [5] Defendant, the Governor of Kentucky, has moved for a stay of enforcement of this Court's February 27, 2014 final order, pending its appeal to the United States Court of Appeals for the Sixth Circuit. On February 28, the Court granted a stay up to and including March 20, 2014, in order to allow the state a reasonable time to implement the order. Defendant moved the Court for an extension of the stay on March 14, and the parties appeared before the Court for a telephonic hearing on the matter on March 17. Defendant filed a notice of appeal on March 18.

I.

[6] Federal Rule of Civil Procedure 62 empowers this Court to stay enforcement of its own orders and judgments. Particularly in civil matters, there are no rigid rules that govern such a stay, and courts have a fair amount of discretion. The Court will consider the following factors: (1) whether the stay applicant has made a strong showing of likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of a stay will substantially injure other parties interested in the proceedings; and (4) where the public interest lies. *Hilton v. Braunskill,* 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987); *Baker v. Adams Cnty./Ohio Valley Sch. Bd.,* 310 F.3d 927, 928 (6th Cir.2002).

Here, the applicant has not made a strong showing of a likelihood of success on the merits. The district courts are so far unanimous, but no court of appeals has issued an opinion. So, one must admit that ultimate resolution of these issues is unknown.[FN1]

The applicant contends that the state will suffer irreparable harm—"chaos"—if the stay is not extended. It must demonstrate "irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted." *Family Trust Found. of*

Ky., Inc. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224, 227 (6th Cir.2004) (quoting *Baker*, 310 F.3d at 928) (internal quotation marks omitted). To illustrate the irreparable harm, the applicant cites the potential granting and then taking away of same-sex marriage recognition to couples. It also cites the potential impacts on "businesses and services where marital status is relevant, including health insurance companies, creditors, [and] estate planners...." This is a legitimate concern.

[7] On the other hand, Plaintiff same-sex couples argue that they would rather have their marriages recognized for a short amount of time than never at all. Plaintiffs contend that the irreparable harms cited by Defendant are actually minor bureaucratic inconveniences which cannot overcome their constitutional rights. The Court agrees that further delay would be a delay in vindicating Plaintiffs' constitutional rights and obtaining access to important government benefits. The loss of a constitutional right for even minimal periods of time constitutes irreparable harm. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998) (citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)).

Finally, the applicant argues that avoiding chaos and uncertainty is in the public's best interest. However, as the Court previously noted, the public interest is twofold: that the Constitution be upheld, and that changes in the law be implemented consistently and without undue confusion. The Court has concerns about implementing an order which has dramatic effects, and then having that order reversed, which is one possibility. Under such circumstances, rights once granted could be cast in doubt.

***14** In this Court's view, the application of these four factors is mixed.

II.

Another issue of great concern is the significance of the Supreme Court's stay of the district court's injunction in *Herbert v. Kitchen*, —— U.S. ——, 134 S.Ct. 893, 187 L.Ed.2d 699 (2014). Since then, three additional cases in which Plaintiffs sought the issuance of marriage licenses have entered stays on their rulings pending appeal. *See Bishop v. United States ex rel. Holder*, 962 F.Supp.2d 1252, 1295–96 (N.D.Okla.2014); *Bostic v. Rainey*, 970 F.Supp.2d 456, ——, 2014 WL 561978, at *23 (E.D.Va.2014); *De Leon v. Perry*, SA–13–CA–00982–OLG, —— F.Supp.2d ——, ——, 2014 WL 715741, at *28 (W.D.Tex. Feb. 26, 2014). The applicant says that it is precedential here.

Plaintiffs make a compelling argument that, at the time of the Supreme Court's guidance in *Kitchen*, the Tenth Circuit had already directed expedited briefing and argument. Here, there is no such guarantee of expedited briefing before the Sixth Circuit. It may be years before the appeals process is completed. Also, our case is different than *Kitchen*. Nevertheless, the Supreme Court has sent a strong message by its unusual intervention and order in that case. It cannot be easily ignored.

Perhaps it is difficult for Plaintiffs to understand how rights won can be delayed. It is a truth that our judicial system can act with stunning quickness, as this Court has; and then with sometimes maddening slowness. One judge may decide a case, but ultimately others have a final say. It is the entire process, however, which gives our judicial system and our judges such high credibility and acceptance. This is the way of our Constitution. It is that belief which ultimately informs the Court's decision to grant a stay. It is best that these momentous changes occur upon full review, rather than risk premature implementation or confusing changes. That does not serve anyone well.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the stay of this

Court's February 27, 2014 final order is extended until further order of the Sixth Circuit.

FN1. *See* ALA.CODE § 30–1–19 (2013); ARIZ.REV.STAT. ANN. §§ 25–101, –125 (2013); ARK.CODE ANN. §§ 9–11–208(b), –107(b) (West 2013); COLO.REV.STAT. ANN. § 14–2–104 (West 2013); FLA. STAT. ANN.. § 741.212 (West 2013); GA.CODE ANN. § 19–3–3.1 (West 2013); HAW.REV.STAT. §§ 572–1, –1.6 (West 2013) (repealed 2011); IDAHO CODE ANN. § 32–209 (West 2013); 750 ILL. COMP. STAT. ANN.N. 5/212(a)(5), 5/213.1 (West 2013); IND.CODE ANN. § 31–11–1–1 (West 2013); KAN. STAT. ANN. . §§ 23–2501, 23–2508 (West 2013); LA. CIV.CODE ANN. art. 89, 3520 (2013); MICH. COMP. LAWS ANN. §§ 551.1, .271(2) (West 2013); MISS.CODE ANN. §§ 93–1–1(2) (West 2013); MO. ANN. STAT. § 451.022 (West 2013); MONT.CODE ANN. § 40–1–401(1)(d) (2013); N.C. GEN.STAT. ANN. § 51–1.2 (West 2013); N.D. CENT.CODE ANN. §§ 14–03–01, –08 (West 2013); OKLA. STAT. tit. 43, § 3.1 (2013); 23 PA. CONS.STAT. ANN. §§ 1102, 1704 (West 2013); S.C.CODE ANN. §§ 20–1–10, –15 (2013); S.D. CODIFIED LAWS §§ 25–1–1, –38 (2013); TENN.CODE ANN. § 36–3–113 (West 2013); TEX. FAM.CODE ANN. §§ 1.103, 2.001 (West 2013); UTAH CODE ANN. § 30–1–2 (West 2013), invalidated by *Kitchen v. Herbert,* 961 F.Supp.2d 1181 (D.Utah 2013); VA.CODE ANN. § 20–45.2 (West 2013); W. VA.CODE ANN. §§ 48–2–104, –401 (West 2013).

FN2. The bill included commentary that stated: "a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits." H.R.REP. NO. 104–664, at 4–11, 1996 U.S.C.C.A.N. 2905, 2914 (1996).

FN3. The pertinent text of these provisions is:

> 402.005: As used and recognized in the law of the Commonwealth, "marriage" refers only to the civil status, condition, or relation of one (1) man and one (1) woman....
>
> 402.020:(1) Marriage is prohibited and void (d) Between members of the same sex.
>
> 402.040:(2) A marriage between members of the same sex is against Kentucky public policy and shall be subject to the prohibitions established in K.R.S. 402.045.
>
> 402.045:(1) A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky. (2) Any rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts.
>
> KY.REV.STAT. ANN. §§ 402.005–.045 (West 2013).

FN4. States passing constitutional amendments banning same-sex marriage in 2004 include Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. Other states followed suit: in 2005, Kansas and Texas; in 2006, Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin; in 2008, Arizona, California, and

Florida; and in 2012, North Carolina. Alaska passed its constitutional ban in 1998, and Nebraska and Nevada did so in 2000. California's, Utah's, and Oklahoma's constitutional bans have since been overturned.

FN5. 53.6% of Kentucky's registered voters participated.

FN6. Recognition by legislation and by popular vote has occurred in Vermont (Apr. 7, 2009), New Hampshire (June 3, 2009), District of Columbia (Dec. 18, 2009), New York (June 24, 2011), Washington (Nov. 6, 2012), Maine (Nov. 6, 2012), Maryland (Nov. 6, 2012), Delaware (May 7, 2013), Minnesota (May 14, 2013), Rhode Island (May 2, 2013), Hawaii (Nov. 13, 2013), and Illinois (Nov. 20, 2013) (effective June 1, 2014). State and federal court judgments have occurred in Massachusetts, Connecticut, Iowa, California, New Jersey, New Mexico, Utah, and Oklahoma. The Utah and Oklahoma decisions are currently being appealed.

FN7. Plaintiffs Franklin and Boyd are residents of Shelby County and originally filed suit in the Eastern District of Kentucky. Judge Gregory Van Tatenhove granted Plaintiffs and Defendants' joint motion for change of venue pursuant to 28 U.S.C. § 1404 to the Western District of Kentucky. The case was assigned to Judge Thomas Russell, who transferred it here in the interest of judicial economy and to equalize the docket. Although the cases were not consolidated, Plaintiffs here subsequently added Franklin and Boyd to this action in their Second Amended Complaint.

FN8. In their Second Amended Complaint, Plaintiffs also alleged discrimination on the basis of sex. However, the current motion before the Court does not mention any such basis. Therefore, the Court will construe this claim to allege only discrimination based on sexual orientation.

FN9. Plaintiffs also seek a declaration that Section 2 of the Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C, as applied to Plaintiffs and similarly situated same-sex couples violates the Due Process, Equal Protection, Freedom of Association, and Full Faith and Credit clauses of the United States Constitution. The Court finds that Section 2 of DOMA, as a permissive statute, is not necessary to the disposition of Plaintiffs' case and therefore will not analyze its constitutionality.

FN10. The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV § 1.

FN11. In *Windsor,* the state of New York enacted legislation recognizing same-sex marriages performed out of state and later amended its own laws to permit same-sex marriage. Section 3 of the Defense of Marriage Act (DOMA) denied recognition to same-sex marriages for the purposes of federal law. As a result of DOMA, a same-sex

spouse did not qualify for the marital exemption from the federal estate tax. She brought an action challenging the constitutionality of Section 3 of DOMA in federal court. The *Windsor* Court applied Fifth Amendment due process and equal protection analysis to the plaintiff's challenge of a federal statute. Our case involves a challenge to a state constitutional provision and state statutes, thus falling under the protections of the Fourteenth Amendment, which is subject to the same substantive analysis.

FN12. Indeed, one district court in this Circuit has found that *Lawrence* destroyed the jurisprudential foundation of *Davis's* line of Sixth Circuit cases, thus leaving the level of scrutiny an open question for lower courts to resolve. *See Obergefell v. Wymyslo,* 962 F.Supp.2d at 986–87 (S.D.Ohio 2013).

FN13. Some courts have construed the right to marry to include the right to remain married. *See, e.g., Obergefell v. Wymyslo,* 962 F.Supp.2d 968 (S.D.Ohio 2013). The logic is that Kentucky's laws operate to render Plaintiffs' marriage invalid in the eyes of state law. This could amount to a functional deprivation of Plaintiffs' lawful marriage, and therefore a deprivation of liberty. *See id.* at 977–79.

FN14. Indeed, Justice Scalia stated that *Windsor* indicated the way the Supreme Court would view future cases involving same-sex marriage "beyond mistaking." 133 S.Ct. at 2709 (Scalia, J., dissenting).

FN15. Senate Bill 245 proposed the amendment to the Kentucky Constitution. The bill's sponsor, state senator Vernie McGaha said:

> Marriage is a divine institution designed to form a permanent union between man and woman.... [T]he scriptures make it the most sacred relationship of life, and nothing could be more contrary to the spirit than the notion that a personal agreement ratified in a human court satisfies the obligation of this ordinance.... [I]n First Corinthians 7:2, if you notice the pronouns that are used in this scripture, it says, 'Let every man have *his* own wife, and let every woman have *her* own husband.' The Defense of Marriage Act, passed in 1996 by Congress, defined marriage for the purpose of federal law as the legal union between one man and one woman. And while Kentucky's law did prohibit the same thing, in '98 we passed a statute that gave it a little more strength and assured that such unions in other states and countries also would not be recognized here. There are similar laws across 38 states that express an overwhelming agreement in our country that we should be protecting the institute [*sic*] of marriage. Nevertheless this institution of marriage is under attack by judges and elected officials who would legislate social policy that has already been in place for us for many, many years.... In May of this year, Massachusetts will begin issuing marriage licenses to same-sex couples.... We in the legislature, I think, have no other choice but to protect our communities from the desecration of these traditional values.... Once this amendment passes, no activist judge, no legislature or county clerk whether in the Commonwealth or outside of it will be able to change this fundamental fact: the sacred institution of marriage joins together a man and a woman for the stability of society and for the greater glory of God.

> S. DEBATE, 108TH CONG., 2ND SESS. (Ky. 2004), ECF No. 38–6 at 1:00:30–1:05:10. Similarly, cosponsor state senator Gary Tapp proclaimed:
>
> For many years, Kentucky has had laws that define marriage as one man and one woman, and in 1998, the General Assembly did strengthen those laws ensuring that same-sex marriages performed in other states or countries would not be recognized here.... While we're not proposing any new language regarding the institution of marriage in Kentucky, this pro-marriage constitutional amendment will solidify existing law so that even an activist judge cannot question the definition of marriage according to Kentucky law.... [W]hen the citizens of Kentucky accept this amendment, no one, no judge, no mayor, no county clerk, will be able to question their beliefs in the traditions of stable marriages and strong families.
>
> *Id.* at 1:05:43–1:07:45. The final state senator to speak on behalf of the bill, Ed Worley, said that the bill was not intended to be a discrimination bill. *Id.* at 1:26:10. However, he offered no other purpose other than reaffirming the historical and Biblical definition of marriage. *See, e.g., id.* at 1:26:20–1:26:50.
>
> One state senator, Ernesto Scorsone, spoke out against the constitutional amendment. He said:
>
> The efforts to amend the U.S. Constitution over the issue of interracial marriage failed despite repeated religious arguments and Biblical references.... The proposal today is a shocking departure from [our constitutional] principles.... To institutionalize discrimination in our constitution is to turn the document on its head. To allow the will of the majority to forever close the door to a minority, no matter how disliked, to any right, any privilege, is an act of political heresy.... Their status will be that of second-class citizens forever.... Discrimination and prejudices will not survive the test of time.
>
> *Id.* at 1:16:07–1:24:00.

FN16. The Supreme Court in *Lawrence v. Texas* explained:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

539 U.S. at 578–79, 123 S.Ct. 2472.

FN1. The applicant cites a potential issue of the applicability of *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972). However, *Baker* dismissed for want of a substantial federal question an action requesting the issuance of a same-sex marriage license, an issue that was not before the Court in our underlying case.

--- F.Supp.2d ----, 2014 WL 556729 (W.D.Ky.)
(Cite as: 2014 WL 556729 (W.D.Ky.))

W.D.Ky.,2014.
Bourke v. Beshear
--- F.Supp.2d ----, 2014 WL 556729 (W.D.Ky.)

END OF DOCUMENT

Not Reported in S.W.3d, 2003 WL 1542148 (Tenn.Ct.App.)
(Cite as: 2003 WL 1542148 (Tenn.Ct.App.))

Court of Appeals of Tennessee.
Sue Ann BOWSER,
v.
John M. BOWSER.

No. M2001-01215-COA-R3CV.
March 26, 2003.

Appeal from the Chancery Court for Maury County, No. 00-322; Jim T. Hamilton, Judge.
Virginia Lee Story, Franklin, Tennessee, for the appellant, Sue Ann Bowser.

James T. DuBois, D. Scott Porch, IV, Columbia, Tennessee, for the appellee, John M. Bowser.

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and HAMILTON V. GAYDEN, JR., Sp. J., joined.

OPINION

PATRICIA J. COTTRELL, J.

***1** Prior to a determination on a complaint for divorce filed by Ms. Bowser, the trial court found the parties to be married pursuant to the common law of Ohio after their first divorce in that state in 1984. The trial court then classified and distributed the marital property and denied Ms. Bowser's request for rehabilitative or *in futuro* alimony. We affirm the decision of the trial court finding that a common law marriage existed, affirm the trial court's distribution of property, modify the alimony decision and remand the cause for further proceedings consistent with this opinion.

This appeal arises from divorce proceedings in which the parties stipulated that Mr. Bowser had been guilty of inappropriate marital conduct. Ms. Bowser appeals the trial court's classification and distribution of property and the trial court's failure to award her spousal support. Mr. Bowser appeals the trial court's preliminary finding that the parties were married. We begin with that issue regarding the fundamental nature of the parties' relationship.

I. Common Law Marriage

Sue Ann Bowser and John Michael Bowser were married in the state of Ohio, where they resided, in 1973. The parties were divorced by order of an Ohio court on July 12, 1984. Both Mr. and Ms. Bowser appeared in court on the day the decree was entered and both signed the decree.

Immediately after the divorce, Mr. Bowser spent about a month in Tennessee. Upon his return to London, Ohio, in August of 1984, Mr. Bowser began living with Ms. Bowser in what had been the marital residence. The parties continued to live together and moved to Tennessee in March of 1986, where they lived as husband and wife until they separated in 1999 after Ms. Bowser discovered Mr. Bowser was having an affair.

Ms. Bowser filed a complaint for divorce, and Mr. Bowser answered and denied that a valid marriage existed between the parties and asserted that, therefore, Ms. Bowser was not entitled to a divorce. The trial court bifurcated the proceedings and first held a hearing on the issue of whether a marriage existed. The court entered an order finding that the parties had been remarried pursuant to the common law of Ohio after their divorce in 1984.[FN1]

FN1. Ms. Bowser asserts the validity of the marriage is not an appealable issue because Mr. Bowser did not appeal within thirty days of the trial court's order deciding that issue. That order did not adjudicate all the claims between the parties and, therefore, was not a final order subject to appellate review absent certification under Tenn. R. Civ. P. 54 or the grant of permission for an interlocutory or extraordinary appeal under Tenn. R.App. P. 9 or 10.

In Tennessee, marriage is statutory, and common law marriages between its citizens based on conduct in this State are not recognized. *Martin v. Coleman*, 19 S.W.3d 757, 760 (Tenn.2000); *In Re Estate of Glover*, 882 S.W.2d 789, 791 (Tenn.Ct.App.1994). However, Tennessee courts will recognize a valid common law marriage entered into under the laws of another state where such marriages are sanctioned. *Shelby County v. Williams*, 510 S.W.2d 73, 73-74 (Tenn.1974); *In re Estate of Glover*, 882 S.W.2d at 791.

The question, therefore, is whether the parties were married under the common law of Ohio. Prior to 1991, the State of Ohio recognized common law marriage, which was defined as "the marital joinder of a man and a woman without the benefit of formal papers or procedures." *Nestor v. Nestor*, 472 N.E.2d 1091, 1094 (Ohio 1984).[FN2] However, such marriages, because they contravene public policy, were disfavored by the courts, and the burden of proving a common law marriage rested with the party claiming its existence. *In re Hammonds*, 315 N.E.2d 843, 847 (Ohio Ct. of Common Pleas 1973).

FN2. In 1991, Ohio enacted a statute which abolished any future common law marriages. Thus, *Nestor* was superceded by statute as stated in *Fitzgerald v. Mayfield*, No. CA516, 1991 Ohio App. LEXIS 5822 (Ohio Ct.App. Nov. 15, 1991), but the statute does not apply to common law marriages existing before its enactment.

***2** In *Nestor*, the Supreme Court of Ohio reiterated that there are three basic elements which must be shown in order to establish a common law marriage: (1) an agreement by competent parties to presently take each other as husband and wife; (2) open cohabitation following the contract; and (3) reputation in the community as being husband and wife. *Nestor*, 472 N.E.2d at 1095. The court explained each element more fully:

> The fundamental requirement to establish the existence of a common law marriage is a meeting of the minds between the parties who enter into a mutual contract to presently take each other as man and wife. The agreement to marry *in praesenti* is the essential element of a common law marriage. Its absence precludes the establishment of such a relationship even though the parties live together and openly engage in cohabitation. Although cohabitation and reputation are necessary elements of a common law marriage, this court has previously held that standing alone they do not constitute a common law marriage.
>
> The contract of marriage *in praesenti* may be proven either by way of direct evidence which establishes the agreement, or by way of proof of cohabitation, acts, declarations, and the conduct of the parties and their recognized status in the community in which they reside. However, all of the essential elements to a common law marriage must be established by clear and convincing evidence.
>
> Where there is no direct proof in reference to the formation of the contract of marriage *in praesenti*, testimony regarding cohabitation and community reputation tends to raise an inference of the marriage. This inference is given more or less strength according to the circumstances of the particular case. The inference is generally strengthened with

> the lapse of time during which the parties are living together and cohabitating as man and wife.
>
> Where there is direct evidence concerning the formation of the contract of marriage *in praesenti* and a finding by the court, as here, that such a contract exists, the evidence of long-time cohabitation and reputation of living together as man and wife should be given even greater weight to further strengthen the inference of marriage.
>
> As to the element of cohabitation, there must be proof that the parties had sexual activity in the open manner of husband and wife in a marital state. Secret cohabitation with its attendant indusium of concealment concerning the sexual activity of the parties will not suffice as evidence of a valid common law marriage.
>
> As to the element surrounding the reputation of the parties in the community as being man and wife, in order to establish a common law marriage it is not necessary that they disseminate information to all society generally, or to all of the community in which they reside. Rather, there must be a holding out to those with whom they normally come in contact. A common law marriage will not necessarily be defeated by the fact that all persons in the community within which the parties reside are not aware of the marital arrangement, nor by the fact that all persons with whom they normally come in contact are also unaware of the arrangement.

***3** *Nestor,* 472 N.E.2d at 1094-95 (citations omitted).

The same day they appeared in court in 1984 for their divorce, Mr. Bowser came to Ms. Bowser's house and told her he had made a mistake and was unhappy. He went to Tennessee that or the next day, but attempts to reconcile continued. Ms. Bowser later spent a week with Mr. Bowser in Tennessee, and the couple traveled to Florida together. After Mr. Bowser returned to Ohio and moved back into the marital home, approximately one month after the divorce hearing, the parties simply continued their lives and their relationship as they had been before the divorce. Everyone, including Mr. Bowser, testified that the relationship between the parties went back to the same as it had been before the parties' divorce and that this arrangement continued for over a year while the parties continued to reside in Ohio.

In late 1985, the parties decided to relocate to Tennessee because Mr. Bowser foresaw opportunities for his home-building business resulting from the announced new Saturn plant there. The parties made several trips to the Columbia area looking for property to build their home and to build other homes for sale. They met with a realtor who helped them in their search. The realtor sent letters to them in Ohio addressed to Mr. and Mrs. Bowser. Offers and contracts for the purchase of real estate were signed by Mr. and Mrs. Bowser; property was deeded to Mike Bowser and wife, Sue Bowser. Documents reflecting these transactions, dated September 11, 1985, October 7, 1985, and October 23, 1985, were introduced into the record.

As part of the parties' divorce, they had agreed to a property settlement which required Mr. Bowser to pay Ms. Bowser $50,000 and to transfer certain real property to her. He made a first payment of $25,000, but never paid the rest, and, after the couple reconciled, the money paid was used for family and household expenses. The real property was never transferred to Ms. Bowser and remained jointly held. Because of the reconciliation, Mr. Bowser never paid the child support that was part of the divorce decree.

Mr. Bowser's brief states that the parties moved to Tennessee in March of 1986. After deciding to move to Tennessee, the parties returned to Ohio on several occasions to sell their real property located there. General warranty deeds for these properties dated

October 16, 1985, September 3, 1986, and November 20, 1987, were made part of the record. Again, these documents reflected that the parties were husband and wife.

It is undisputed that the parties have filed joint tax returns, as married persons, for a number of years. In his deposition and testimony at trial Mr. Bowser stated that in 1984 and 1985 the couple "more than likely" filed joint tax returns and that since the parties moved to Tennessee in 1985 or 1986 they had filed joint tax returns.

Although Mr. Bowser testified he never introduced Ms. Bowser as his wife and did not hold himself out as married to Sue Bowser, he also testified he did nothing to correct the many references to the parties as husband and wife, including those on legal documents and tax returns.

***4** Ms. Bowser testified she believed the divorce was never final or effective, although she was not allowed to testify as to the basis for that belief. Essentially, she allowed Mr. Bowser to return to the marital home and to a relationship that was the same as before the divorce because he wanted things back as they used to be and promised not to be unfaithful again. They remained together, living and acting as husband and wife, for another sixteen years after their reconciliation.

There was testimony from the parties, members of their families, a longtime friend who lived in Ohio when the parties lived there, the Tennessee realtor who helped them find property when they moved, and others. From all the evidence, the trial court concluded that Ms. Bowser had shown by clear and convincing evidence that the parties had cohabited in Ohio for more than a year after their divorce, that the parties' community reputation was as husband and wife in Ohio, and that the parties' acts and declarations while in Ohio supported a finding of common law marriage in Ohio. Our review of the evidence supports those findings. Further, there is clear and convincing evidence that the parties, through their acts and conduct, held themselves out as husband and wife.

Mr. Bowser testified he never agreed or promised to re-marry Ms. Bowser. Of course, if she believed they had never been divorced, no such promise would have been expected. It was her intent and understanding that when they resumed cohabitation they were married. Thus, she had the present intent to be married and entered into the arrangement with that intent and understanding. Although Mr. Bowser disputes his intent to "re-marry" Ms. Bowser, his actions and conduct at that point and in the future contradict any assertion he did not intend to be married to her.

Thus, applying the facts of this case to the Ohio Supreme Court's instruction regarding how the necessary contract may be proved, i.e., by inference which may be stronger or weaker depending upon the particular facts and is created by cohabitation and community reputation, we affirm the trial court's conclusion that Ms. Bowser had proved by clear and convincing evidence a present contract to marry at the time they resumed cohabitation. While the existence of a valid contract between the parties had to be proved by conduct that occurred while the parties lived in Ohio, we find that the conduct of the parties in the sixteen years after they moved to Tennessee strengthened the inference of that contract.

Consequently, we affirm the trial court's determination that the parties were married in 1984 according to the common law of Ohio.

II. Distribution of Property

The next issue in this appeal is the trial court's classification, valuation and distribution of the parties' real and personal property. Ms. Bowser argues that the trial court erred by not awarding her all her separate property and also erred in failing to award her a

greater share of the marital property.

***5** Upon the dissolution of a marriage, courts are called upon to divide the assets the parties accumulated during the marriage. Such decisions are very fact-specific, and many circumstances surrounding the property, the parties, and the marriage itself play a role. The task involves several steps, the first being to determine whether an asset is subject to division at all.

A. Wife's Separate Property

Tennessee, being a "dual property" state, recognizes two distinct classes of property: "marital property" and "separate property." *Batson v. Batson*, 769 S.W.2d 849, 856 (Tenn.Ct.App.1988). The distinction is important because, in an action for divorce, only marital property is divided between the parties. Tenn.Code Ann. § 36-4-121(a)(1); *Brock v. Brock*, 941 S.W.2d 896, 900 (Tenn.Ct.App.1996). Separate property is not part of the marital estate subject to division. *Cutsinger v. Cutsinger*, 917 S.W.2d 238, 241 (Tenn.Ct.App.1995). Accordingly, when it comes to dividing a divorcing couple's property, the court should initially identify the separate property, if any, belonging to each party. *Anderton v. Anderton*, 988 S.W.2d 675, 679 (Tenn.Ct.App.1998).

The general rules for determining whether property is separate or marital are found in statute. Tenn.Code Ann. §§ 36-4-121(b)(1) & -121(b)(2). Of course, the courts must apply these rules to the specific facts of each case. In addition, conduct between the parties can affect the classification of the property, and certain conduct can create presumptions as to separate or joint ownership. *See, e.g.*, *Kincaid v. Kincaid*, 912 S.W.2d 140, 142 (Tenn.Ct.App .1995); *McClellan v. McClellan*, 873 S.W.2d 350, 351 (Tenn.Ct.App.1993); *Barnhill v. Barnhill*, 826 S.W.2d 443, 452 (Tenn.Ct.App.1991); *Batson*, 769 S.W.2d at 858.

Therefore, the determination of whether property is jointly or separately held depends upon the circumstances. *Langford v. Langford*, 220 Tenn. 600, 421 S.W.2d 632, 634 (1967). Whether an asset is separate property or marital property is a question of fact. *Cutsinger*, 917 S.W.2d at 241; *Sherrill v. Sherrill*, 831 S.W.2d 293, 295 (Tenn.Ct.App.1992). Thus, a trial court's classification decisions are entitled to great weight on appeal. *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn.Ct.App.1996). These decisions will be presumed to be correct unless the evidence preponderates otherwise, *Hardin v. Hardin*, 689 S.W.2d 152, 154 (Tenn.Ct.App.1983), or unless they are based on an error of law. *Mahaffey v. Mahaffey*, 775 S.W.2d 618, 622 (Tenn.Ct.App.1989).

Ms. Bowser asserts that the trial court incorrectly classified some items as marital property which were actually her separate property. At trial, Ms. Bowser testified that fifty items, listed on a schedule which was attached as Exhibit A to the court's order, were her separate property. The trial court specifically found "all items on this schedule, except for items 17 and 18, the Pecos Bill Disney collectible and the Slewfoot Sue Disney collectible, to be the separate property of the Plaintiff." Indeed, item 17 on the schedule was the Pecos Bill Disney collectible and item 18 was the Slewfoot Sue Disney collectible, which Ms. Bowser valued at $1,000 and $600 respectively.

***6** After hearing both parties' motions to alter or amend, the trial court clarified its earlier order and awarded the two specified Disney collectibles to Ms. Bowser, stating the court had re-examined its notes and had intended to award these pieces to Ms. Bowser.

On appeal, Ms. Bowser's brief merely states that based on the evidence, Ms. Bowser should receive as her separate property the 50 separately listed items. She was awarded 48 of those items as separate property and the other 2 in the later order. In her table explaining the trial court's distribution of property, Ms. Bowser lists $1,000 of the Disney collection as having been awarded to her. In her suggestion to this

court of how the property should be divided, she appears to include in the marital property only that portion of the Disney collection awarded to Mr. Bowser. From this, we interpret Ms. Bowser's argument to be that the two collectibles awarded to her by the trial court's clarification should not be included in the marital estate.

The trial court's original order treated most [FN3] of the Disney collection as marital property, awarding $20,000 of it to Mr. Bowser and $1,000 worth to Ms. Bowser. The trial court's later order awarded the two collectibles which had been excluded from the list of Ms. Bowser's separate property to Ms. Bowser, but did not identify the two collectibles as either marital or separate. We interpret the two orders, however, as classifying the Pecos Bill and Slewfoot Sue pieces as marital property.

FN3. At trial, Ms. Bowser only claimed three pieces in the collection as gifts to her. The third, Snow White and the Seven Dwarfs, which she valued at $1,000, was awarded to Ms. Bowser as her separate property, since it was not one of the two items on the list excluded by the court.

At trial, Ms. Bowser testified that although the collection had started out as hers, most of the collection had been bought by Mr. Bowser for himself. He was the one who was interested in the collection. She testified that the Pecos Bill and Slewfoot Sue figures had been bought by Mr. Bowser as gifts for her. Mr. Bowser testified that he bought each of those for his collection, that both were older pieces he had wanted to acquire, that Ms. Bowser was with him when he made the purchases, and that they were not gifts to Ms. Bowser.

Faced with this directly contradictory evidence, the trial court was free to accredit one party's testimony. Here, the trial court found the two pieces to be marital property, but awarded them to Ms. Bowser. The evidence does not preponderate against the trial court's classification of the pieces.

We also feel compelled to point out that reducing the marital estate by the value of the two figures ($1,600 according to Ms. Bowser; $1,000 according to the court), as Ms. Bowser insists should be done, would make an infinitesimal difference in the total amount, since the trial court valued the marital property at a little over $500,000. It would make no difference in the equities of the division.

B. Distribution of the Marital Property

After classification of the parties' property as either marital or separate, the trial court is charged with equitably dividing, distributing, or assigning the marital property in "proportions as the court deems just." Tenn.Code Ann. § 36-4-121(a)(1). The court is to consider several factors in its distribution. Tenn.Code Ann. § 36-4-121(c) (listing the factors to be considered). The court may consider any other factors necessary in determining the equities between the parties, Tenn.Code Ann. § 36-4-121(c)(11), except that division of the marital property is to be made without regard to marital fault. Tenn.Code Ann. § 36-4-121(a)(1).

***7** The court's distribution of property "is not achieved by a mechanical application of the statutory factors, but rather by considering and weighing the most relevant factors in light of the unique facts of the case." *Batson*, 769 S.W.2d at 859. An equitable distribution is not necessarily an equal one. *Word v. Word*, 937 S.W.2d 931, 933 (Tenn.Ct.App.1996). Thus, a division is not rendered inequitable simply because it is not precisely equal, *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn.1996); *Kinard v. Kinard*, 986 S.W.2d 220, 230 (Tenn.Ct.App.1998). Similarly, equity does not require that each party receive a share of every piece of marital property. *King v. King*, 986 S.W.2d 216, 219 (Tenn.Ct.App .1998); *Brown v. Brown*, 913 S.W.2d 163, 168 (Tenn.Ct.App.1994).

The trial court's goal in a divorce case is to divide the marital property in an essentially equitable manner, and equity in such cases is dependent on the facts of each case. The fairness of a particular division of property between two divorcing parties is judged upon its final results. *Watters v. Watters,* 959 S.W.2d 585, 591 (Tenn.Ct.App.1997). Because dividing a marital estate is a process guided by considering all relevant factors, including those listed in Tenn.Code Ann. § 36-4-121(c), in light of the facts of a particular case, a trial court has a great deal of discretion concerning the manner in which it divides marital property. *Smith v. Smith,* 984 S.W.2d 606, 609 (Tenn.Ct.App.1997); *Wallace v. Wallace,* 733 S.W.2d 102, 106 (Tenn.Ct.App.1987). Appellate courts ordinarily defer to the trial judge's decision unless it is inconsistent with the factors in Tenn.Code Ann. § 36-4-121(c) or is not supported by a preponderance of the evidence. *Wilson,* 929 S.W.2d at 372; *Brown,* 913 S.W.2d at 168.

As part of its responsibility to divide the marital estate equitably, the trial court must determine the value of the property included. The value to be placed on an asset is a question of fact. *Kinard,* 986 S.W.2d at 231. The parties herein submitted pretrial stipulations of fact establishing an agreed-upon value for most assets.

In the case before us, the trial court first dealt with the personal property, valuing and then distributing it. The total of the values assigned by the court to the items included in its list of personal property is $279,872. The trial court then made awards of specific assets to each of the parties. The total of the values assigned to the awarded assets is $201,175. The difference between the two totals is explained by the fact that the court included a retirement account in its original listing of marital property, but did not award that asset to either party in its itemized distribution of personal property assets. [FN4]

FN4. In addition, the court valued the Disney collection at $20,000 in its listing of assets in the marital estate, but valued the portion awarded to Mr. Bowser at $20,000 and the portion awarded to Ms. Bowser at $1,000. This small discrepancy does not affect the equity of the division. We merely point it out to clarify our numbers.

The trial court totaled the values of the assets awarded to Ms. Bowser, arriving at $107,200, and stated that was 53.29% of the total personal property in the marital estate.[FN5] The court then made awards of specific assets to Mr. Bowser, totaled the value of those awards at $93,975, and determined that amount to be 46.71% of the personal property estate.

FN5. The trial court obviously meant that it was 53.29% of the total personal property actually awarded.

***8** In making the specific awards of personal property, the trial court awarded Ms. Bowser: the "Leann Cole" note ($20,000); clothing, jewelry, household goods and furnishings in the marital residence ($15,750); the 1999 Lexus ($26,950); one-half of the checking account (approximately $9,500); [FN6] the monetary equivalent to one-half of the business known as "John Bowser Homebuilder" ($34,000); [FN7] and the two Disney Collectibles ($1,000), as discussed above.

FN6. Ms. Bowser claimed the value of the checking account to be $21,610 and Mr. Bowser claimed the account contained only $18,500. The trial court resolved this issue by assigning a value to the checking account of approximately $19,000 and ordering it to be divided equally between the parties.

FN7. The court thus found the business was

> worth $68,000, and divided this amount between the parties. We note that in both her pretrial filing and in her tabulation filed pursuant to Tenn. Ct.App. R. 7, Ms. Boswer valued the business at $68,000.

Out of the personal property, the trial court awarded Mr. Bowser: all items of personalty including clothing, jewelry, household goods and furnishings in his possession; all tools, equipment, inventory and accounts receivable pertaining to the business known as John Bowser Homebuilders, less the cash award to the Plaintiff ($34,000); the 1997 Chevy 3500 with utility, the 1992 Chevy 3500 dump truck and the 1997 Riviera automobiles ($30,475); one-half of the checking account (approximately $9,500); and the bulk of the Disney collectibles ($20,000).

The parties stipulated that their real property had a total value of $415,200 with an indebtedness of $187,700. After dividing the personal property, the trial court then ordered the parties' real property [FN8] to be sold at public auction with all proceeds to be applied to the marital debts, court costs, and attorney's fees of both parties. After the deductions specified, the court ordered that the remaining proceeds be divided between the parties in the same percentage as resulted from the distribution of personal property, with Ms. Bowser receiving 53.29% and Mr. Bowser receiving 46.71%. Some clarifications were later made, as more fully described below.

> FN8. This included the marital home located at 112 Masters Lane, Columbia, Tennessee; the adjoining lot, being Lot 47 of the Stoneybrook Estates; Lot 10 of the Allan Allias Subdivision, which was where the business known as John Bowser Homebuilder was located; Lot 9 with improvements in the Forrest Hills Subdivision; and Lots 1, 2 and 3 of Picketts Pointe.

In addition to this general description of the property distribution, Mr. Bowser was awarded a Met Life cash value insurance policy as his separate property. The parties' retirement account, in Mr. Bowser's name only, valued at $79,697, was awarded to Ms. Bowser as alimony *in solido*. The trial court found that the parties had accumulated total assets in an approximate amount of $696,072 and indebtedness totaling $187,700 for a net worth of $508,372.

Ms. Bowser makes a general argument regarding the equity of the distribution of property, which we will discuss below. That discussion will be aided, however, by our first discussing a few specific findings or awards by the trial court and Ms. Bowser's objections thereto.

(1) The Leann Cole Note

Ms. Bowser alleges that the trial court erred in awarding, as part of her portion of the marital property, a $20,000 note representing a lien on a home built by Mr. Bowser for Ms. Bowser's daughter from a previous marriage, Leann Cole. Ms. Bowser argues that the note is not a real asset of the parties, as they never intended to collect on it and only placed the lien against the property in the event that her daughter and former son-in-law got a divorce. The trial court found the note which is secured by a deed of trust on Ms. Cole's residence to be "a 'real' note and that it was due and payable to the holder thereof" and awarded it to Ms. Bowser in her marital property. We find that the evidence does not preponderate against this finding of fact by the trial court. Of course Ms. Bowser's real complaint is that because she has no intention of collecting on the note, it has no real value and its face amount should not be credited to her as part of her share of the marital property. Whether or not she intends to collect, the note is an asset which was properly included in the marital estate and in Ms. Bowser's share of that estate.

(2) The Retirement Account

***9** In the trial court both parties listed the retire-

ment account, valued at $79,697, as marital property. Each party proposed that the trial court award the entirety of the account to him or her. In their Tenn. Ct.App. R. 7 tabulations, both parties also list the account as marital property. That classification is correct. Tenn.Code Ann. § 36-4-121(b)(1)(A) & (b)(1)(B).

The trial court specifically included this account in its listing of personal property in the marital estate. However, it did not award the account, or a portion thereof, to either or both parties in its distribution of marital property. Instead, the trial court awarded Ms. Bowser the parties' retirement account as alimony *in solido*. The failure of the court to distribute the funds in the account according to the principles set out above was, technically, error. However, it is clear that the court awarded the entirety of the account to Ms. Bowser based upon its balancing of the financial situations of both parties. We will not disturb that award, but correct the nomenclature to reflect its true character as an award of marital property.

We note, however, that the award of the retirement account to Ms. Bowser changes the percentages of the distribution. Including the retirement account in the distributed marital estate increases the total of their personal property to $280,872. Awarding the account to Ms. Bowser increases her total to $186,897. Mr. Bowser's total remains the same at $93,975. Therefore Ms. Bowser was awarded 66.5% of the marital personal property, or essentially two-thirds, and Mr. Bowser was awarded 33.5%, or essentially one-third. Overall equity of the distribution is the goal, and the precise percentages involved are not determinative. They are simply a sometimes helpful way to apply practical measurements to the goal.

(3) The Marital Residence

Ms. Bowser objects to the way the trial court dealt with the marital residence, valued at $180,000, and an adjoining lot, valued at $20,000. The trial court, finding that the parties owned several tracts of real property, including the marital residence, with a total stipulated value of $415,200, and a total indebtedness of $187,700, ordered that all the real property be sold and the proceeds applied: (1) to the marital debt consisting of a line of credit and loan secured by a lot in Forest Hills subdivision; (2) all court costs and remaining balances toward attorney's fees of both parties; and (3) the remaining balance split between the wife, at 53.29% and the husband at 46.71%.

After motions to alter or amend, the trial court determined that the proceeds from the sale of the marital residence should not be used to satisfy the line of credit because it was “totally business related and beyond the control of the Plaintiff.” After the trial court's order on the motions to alter or amend, a number of other motions were filed regarding, among other things, disposition of proceeds from the sale of real estate, a stay of the order to sell the marital residence, contempt for not complying with the order, and attorney's fees.[FN9] The issues raised in these numerous post-trial motions were dealt with in part in an Agreed Order.

FN9. Some of the fees were apparently related to proceedings requesting and opposing protective orders.

***10** In a later order, the trial court limited the documents to be included in the record as post judgment facts; clarified the award of a specific portion of the attorney's fees; denied Mr. Bowser's request for a protective order and a finding of contempt against Ms. Bowser; and made other rulings discussed later in this opinion.

The documents allowed in the record include a settlement statement showing the sale of six parcels of property for a total of $228,250, with deductions for expenses, taxes, and payoff of indebtedness, leaving a balance of $18,285.28 to be paid to the Bowsers. The documents indicate that Mr. Bowser purchased five of

the six parcels of property. In addition to those six parcels, the parties agreed, as evidenced by an Agreed Order, to list the marital residence with a realtor before auctioning it.

Ms. Bowser asserts that the trial court erred in requiring that the marital residence be auctioned. After the trial court's initial order, Ms. Bowser had asked for a stay of the sale of the residence. However, Ms. Bowser signed an agreed order evidencing the parties' agreement that the residence would continue to be listed until a specified date and if no contract were executed by that date, the house was to be sold at auction. Because Ms. Bowser agreed to the auction of the house, however reluctantly, she cannot complain of it on appeal.

In the agreed order, however, Ms. Bowser retained the right to contest the distribution of assets on appeal, and she has done so. In her brief, Ms. Bowser suggests that the marital residence and adjoining lot, or the equity therein, should be awarded to her.

(4) Equitable Distribution

Ms. Bowser asserts that the award to her of 53.29% of the parties' property was inequitable because she is the economically disadvantaged spouse, is 58 years old with health problems, and has an 8th grade education and little employment history except with her husband's construction business, making her earning potential much less than her husband's. In addition, she asserts that her contributions to the marriage and to the parties' accumulation of assets, as well as the duration of the parties' marriage, weigh in favor of a greater share of property being awarded to her. She asks for an additional judgment in an amount determined by this court to be equitable.

The financial situation of the parties is also relevant to Ms. Bowser's request for alimony or spousal support, as many of the same factors are applicable in that consideration. In addition, the property a spouse receives as part of the distribution of the marital estate upon divorce is an important factor in determining the need for, nature, and amount of spousal support. It is one of the statutory factors which courts are to consider in making spousal support decisions. Tenn.Code Ann. § 36-5-101(d)(1)(H). Both property division and support awards can be used to address the needs of an economically disadvantaged spouse.

***11** Our Supreme Court has explained the relationship between spousal support and the distribution of marital property when one spouse is economically disadvantaged.

> All relevant factors, including those set out in § 36-5-101(d)(1), must be considered on a case-by-case basis to determine the nature and extent of support. Tenn.Code Ann. § 36-5-101(d)(1). Factor (H) requires the trial court to consider the division of marital property when awarding alimony. Tenn.Code Ann. § 36-5-101(d)(1)(H). The division of marital property involves the distribution of both marital assets and marital debts. *See Anderton v. Anderton*, 988 S.W.2d 675, 679 (Tenn.Ct.App.1998); *Mondelli v. Howard*, 780 S.W.2d 769, 773 (Tenn.Ct.App.1989). We encourage trial courts to use the division of marital property to assist in meeting the disadvantaged spouse's financial needs when feasible. *See Crabtree*, 16 S.W.3d at 361 n. 4 ("In cases in which there is a disparity between the relative earning capacities of the parties, a trial court also may consider adjusting the award of marital assets to assist the disadvantaged spouse."); *see also Renfro v. Renfro*, 848 P.2d 830, 834 (Alaska 1993) (establishing a preference for meeting the parties' needs with the division of marital property, rather than with alimony). Section 36-4-121 of the Tennessee Code Annotated does not require an equal division of marital property but an equitable division. Tenn.Code Ann. § 36-4-121(a)(1); *see Ellis v. Ellis*, 748 S.W.2d 424, 427 (Tenn.1988). When practical, therefore, a trial court should consider awarding

more assets to an economically disadvantaged spouse to provide future support, rather than relying solely upon an award of alimony. When there are few marital assets but a considerable amount of marital debt, a trial court should similarly consider awarding a disadvantaged spouse a lesser amount of marital debt. Careful distribution of the marital property may assist the disadvantaged spouse in achieving rehabilitation in furtherance of the legislative policy of eliminating spousal dependency.

Robertson v. Robertson, 76 S.W.3d 337, 341 (Tenn.2002).

Absent a showing by Ms. Bowser of greater need due to economic disadvantage, the trial court's distribution of property would appear equitable. Whether that distribution should be modified to meet Ms. Bowser's needs depends upon consideration of the factors and issues relevant to spousal support. Therefore, we must consider the issues surrounding Ms. Bowser's request for spousal support.

III. Spousal Support

After dividing the parties' property, the trial court awarded Ms. Bowser the parties' retirement fund with a balance of approximately $79,697, as alimony *in solido.* As discussed above, that award is more accurately characterized as part of the distribution of marital property. The trial court's intent in that award was to assist Ms. Bowser financially, and the use of marital property to help meet the needs of an economically disadvantaged spouse is appropriate.

***12** Ms. Bowser alleges that the trial court erred in failing to award her alimony *in futuro* or rehabilitative alimony.

Trial courts have broad discretion to determine whether spousal support is needed and, if so, its nature, amount and duration. *Burlew v. Burlew,* 40 S.W.3d 465, 470 (Tenn.2001). Appellate courts are generally disinclined to second-guess a trial court's spousal support decision unless it is not supported by the evidence or is contrary to public policies reflected in applicable statutes. *Bogan v. Bogan,* 60 S.W.3d 721, 733 (Tenn.2001); *Kinard,* 986 S.W.2d at 234; *Brown,* 913 S.W.2d at 169. Our role is to determine whether the award reflects a proper application of the relevant legal principles and that it is not clearly unreasonable. *Bogan,* 60 S.W.3d at 733. When the trial court has set forth its factual findings in the record, we will presume the correctness of those findings so long as the evidence does not preponderate against them. Tenn. R.App. P. 13(d); *Bogan,* 60 S.W.3d at 733; *Crabtree v. Crabtree,* 16 S.W.3d 356, 360 (Tenn.2000).

Alimony or spousal support is authorized by statute, Tenn.Code Ann. § 36-5-101(a)(1), which gives courts discretion to order "suitable support and maintenance of either spouse by the other spouse ... according to the nature of the case and the circumstances of the parties...." There are no hard and fast rules for spousal support decisions, and such determinations require a "careful balancing" of the relevant factors. *Anderton,* 988 S .W.2d at 682-83. In determining whether to award support and the nature, amount and length of such support, the court is to consider all relevant factors, including those enumerated in Tenn.Code Ann. § 36-5-101(d)(1).[FN10]

FN10. The factors the court must consider in setting the alimony obligation are:

(A) The relative earning capacity, obligations, needs and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;

(B) The relative education and training of each party, the ability and opportunity of each party to secure such education and

> training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;
>
> (C) The duration of the marriage;
>
> (D) The age and mental condition of each party;
>
> (E) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
>
> (F) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;
>
> (G) The separate assets of each party, both real and personal, tangible and intangible;
>
> (H) The provisions made with regard to the marital property as defined in § 36-4-121;
>
> (I) The standard of living of the parties established during the marriage;
>
> (J) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
>
> (K) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and
>
> (L) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.
>
> Tenn.Code Ann. § 36-5-101(d)(1).

Initial decisions regarding the entitlement to spousal support, as well as the amount and duration of spousal support, hinge on the unique facts of each case, and court must weigh and balance all relevant factors. *Robertson*, 76 S.W.3d at 338; *Watters*, 22 S.W.3d at 821. Among these factors, the two considered to be the most important are the disadvantaged spouse's need and the obligor spouse's ability to pay. *Robertson*, 76 S.W.3d at 342; *Bogan*, 60 S.W.3d at 730; *Manis v. Manis*, 49 S.W.3d 295, 304 (Tenn.Ct.App.2001). Of these two factors, the disadvantaged spouse's need is the threshold consideration.

> While there is no absolute formula for determining the amount of alimony, "the real need of the spouse seeking the support is the single most important factor. In addition to the need of the disadvantaged spouse, the courts most often consider the ability of the obligor spouse to provide support."
>
> *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn.1995) (quoting *Cranford v. Cranford*, 772 S.W.2d 48, 50) (Tenn.Ct.App.1989)).

Among the statutory factors to be considered in deciding whether to award alimony are: the relative earning capacity, obligations, needs, and financial resources of each party; the relative education and training of each party; the ability and opportunity and necessity of each party to secure such education and training in order to improve such party's earning capacity to a reasonable level; and the assets of each party, whether they be separate assets or marital property awarded in the divorce. Tenn.Code Ann. §

36-5-101(d)(1). Relative economic disadvantage incorporates the principles of need and ability to pay.

***13** Where such disadvantage exists, the legislature has expressed a preference for rehabilitative alimony over long-term, open-ended alimony *in futuro.* Tenn.Code Ann. § 36-5-101(d)(1); *Robertson,* 76 S.W.3d at 339-40; *Burlew,* 40 S.W.3d at 470; *Crabtree,* 16 S.W.3d at 358. The purpose of an award of rehabilitative alimony is to encourage divorced spouses to become self-sufficient. *Robertson,* 76 S.W.3d at 339-40; *Burlew,* 40 S.W.3d at 471, *Crabtree,* 16 S.W.3d at 360.

Rehabilitative alimony is appropriate where the spouse is economically disadvantaged, but where rehabilitation is possible by the grant of "rehabilitative, temporary support and maintenance." Tenn.Code Ann. § 36-5-101(d)(1). Our Supreme Court has discussed the purposes behind alimony, stating:

> The prior concept of alimony as lifelong support enabling the disadvantaged spouse to maintain the standard of living established during the marriage has been superseded by the legislature's establishment of a preference for rehabilitative alimony. The parties' incomes and assets will not always be sufficient for them to achieve the same standard of living after divorce that they enjoyed during the marriage. However, rehabilitative alimony may assist the disadvantaged spouse in obtaining further education or training. It may also provide temporary income to support the disadvantaged spouse during the post-divorce economic adjustment.

Robertson, 76 S.W.3d at 340-41.

In determining whether a disadvantaged spouse can be rehabilitated with short-term support, the court is to consider "every relevant factor." *Id.* 76 S.W.3d at 340. Neither the standard of living the parties enjoyed during the marriage nor the income or earning potential of the other spouse can be used as the sole or determinative factor. *Id.; Crabtree,* 16 S.W.3d at 359.

Where, considering all the relevant factors, rehabilitation is not possible, the courts should not refrain from awarding long-term support when that support is appropriate under the statutory factors. *Robertson,* 76 S.W.3d at 341-42. The statutory preference for rehabilitative support does not entirely displace other forms of support. *Id.; Anderton,* 988 S.W.2d at 682. The support statute itself provides for the grant of an award of support on a long-term basis "where there is such relative economic disadvantage and rehabilitation is not feasible in consideration of all relevant factors." Tenn.Code Ann. § 36-5-101(d)(1). The purpose of alimony *in futuro* is to provide financial support to a spouse who cannot be rehabilitated. *Burlew,* 40 S.W.3d at 470-71.

In the present case, the trial court found that it was feasible for Ms. Bowser to be rehabilitated even though Ms. Bowser "at the time of the divorce trial was fifty-seven (57) years old and has only an 8th grade education" stating:

> This Court feels that the Plaintiff is capable of being rehabilitated despite her age and educational background. She has ample experience in the home construction business to be placed in home improvement and construction companies such as Home Depot or Lowes. These companies look favorably on employing persons with experience in home construction or improvement. The Court therefore finds that the Plaintiff is not a candidate for alimony in futuro and the award of alimony in solido is more appropriate.

***14** The Court in making a decision toward alimony is taking into consideration the facts that Plaintiff's earning capacity is substantially less than the Defendant's, the Defendant's contribution to the demise of the marriage based on his inappropriate marital

> conduct, the long duration of the parties and the standard of living enjoyed by the parties as well as the drug trafficking the parties admitted to participating in some years ago which enabled them to enjoy a higher standard of living and where most of the assets of the parties originated. The more important factor to the decision to award rehabilitative alimony or alimony in solido is the Plaintiff's need and the Defendant's ability to pay. Need and the ability to pay are the critical factors in setting the amount of an alimony award. *Smith v. Smith*, 912 S.W.2d 155, 159 (Tenn.Ct.App.1995).
>
> The Court finds that with the Plaintiff's talent shown in her exhibit, she will be able to find employment. The Court does, however, award the Plaintiff the retirement plan of the parties with an approximate balance of Seventy-nine Thousand Six Hundred Ninety-seven ($79,697.00) Dollars as alimony *in solido.* With the award to her from the sale of their assets, along with her portion of the marital personal property and the retirement fund as alimony *in solido*, the Plaintiff will be able to live comfortably.

The trial court found that Ms. Bowser's earning capacity was substantially less than her husband's. We agree. She has limited education and has several health problems, including heart problems, a thyroid condition and scoliosis. [FN11] Combined with her age and her past work experience, which involved working in the parties' construction business for which she did not receive pay, these facts indicate little likelihood she could greatly increase her earning capacity through training. Mr. Bowser, on the other hand, testified at the trial that he was 51 years old and in "excellent" mental and physical health, aside from occasional back pain. He retained the construction business, which will provide him with income, while Ms. Bowser must find employment elsewhere. The tax returns in the record indicate income from the business of $58,000 in 1999, $38,000 in 1998, and $58,000 in 1997.

FN11. Mr. Bowser testified that he was aware that Ms. Bowser had these health problems.

Ms. Bowser's Income and Expense statement reflects that she had no income. During the pendency of the case, Ms. Bowser received *pendente lite* support, and had $3,219 in monthly expenses. The trial court found that "the Plaintiff [Ms. Bowser] has sustained her needs since the parties' separation with the Defendant paying her Two Hundred Dollars ($200) per week plus her utility bills." Ms. Bowser testified that she had barely sustained herself on this amount, and had to forego some things including some medication, necessary repairs and maintenance to her car and home appliances, clothes, and paying her medical and legal bills. Her expense statement did not include an amount for rent or house payment.

***15** Mr. Bowser's Income and Expense statement reflected that his monthly net business profits were $4,293 and that his net monthly income after taxes and deductions is $2,862. He claimed monthly expenses of $2,799, leaving him only $63 a month after expenses. In addition, he testified that several of his expenses such as the $236 per month in insurance and $167 per month in car expenses are at least in part written off at the end of the year as business expenses on his income taxes. Importantly, Mr. Bowser did not dispute that he had been paying Ms. Bowser $200 per week in support since the parties separated in addition to paying all of the utilities for the marital residence. This amount was not included as an expense on his Income and Expense statement.

We note that neither party came out of the divorce with any debt. Because of the way the trial court structured the distribution of property, all then existing debt was paid from the proceeds of the sale of the real property, and the parties' assets were awarded free of encumbrance. Thus, their needs, or expenses, do not include loan payments. Neither was awarded a residence, so housing costs are to be anticipated.

Suffice it to say that certain items of claimed expenses could be questioned for both parties. We note that Ms. Bowser's claimed monthly expenses exceed those of Mr. Bowser by approximately $420 per month, and her expenses do not include housing costs, which Mr. Bowser claims at $550. One area in which Ms. Bowser could be expected to have greater expense than Mr. Bowser is in medical care and medication. She lists that cost at $250 more per month than Mr. Bowser claims.

If we accept Mr. Bowser's expenses as reasonable, and assume that it is reasonable to expect the parties to have roughly equivalent expenses, but allowing for Ms. Bowser's increased medical costs, Ms. Bowser's monthly living expenses would amount to approximately $3,000. There is nothing in the record to indicate that Ms. Bowser could obtain employment which would in the immediate or near future provide her with that amount of take home pay each month. While Ms. Bowser was awarded over half of the marital property, none appears to be income producing. Thus, she would be required to deplete those assets, including the retirement account, in order to be self-sufficient.

We do not disagree with the trial court's assessment that its award to her of the retirement account will assist her in maintaining herself, but have concerns about her need to totally deplete that asset before retirement. Neither do we disagree that Ms. Bowser should be expected to maintain employment, but are unconvinced that she can in the near future earn enough to be self-sufficient without using her assets in their entirety in a short time.

Based upon all the relevant factors, including the economic factors outlined above, the duration of the marriage, the contributions of each to the marriage, and the age and health of each, we conclude that Ms. Bowser is entitled to rehabilitative alimony for support during the post-divorce economic adjustment with the goal of her reaching self-sufficiency, through employment, use or investment of assets, or other income, after that period of adjustment. Consequently, we hold that Ms. Bowser should be awarded rehabilitative alimony in the amount of $500 per month for five years, or sixty months, from the date of the divorce. Upon remand, the trial court shall determine an appropriate method for payment of those amounts which would have been paid during the pendency of this appeal.

***16** We have considered a re-distribution of the marital property to effectuate the same result, but determined that the practicalities of implementing such an order, especially in view of the auctions which were to have taken place, militate against that course. We affirm the trial court's distribution of property.

IV. The Accounting Evidence

Ms. Bowser also seeks to have this court remand the case to the trial court for a new trial to consider accounting evidence regarding the finances of Mr. Bowser's business. This issue requires a background explanation. In preparation for trial, Ms. Bowser hired an accountant to review various records of the construction business operated by Mr. Bowser. This fact was first brought out at trial in cross-examination of Ms. Bowser regarding her request that Mr. Bowser pay her attorney's fees and the bill offered in support of that request. The bill included an outside fee for David Mensel, an accountant, as well as attorney time spent with Mr. Mensel. Ms. Bowser stated Mr. Mensel would not be a witness in the case, and her attorney argued that the accountant's fees were litigation expenses incurred upon recommendation of counsel, whether they chose to use Mr. Mensel as a witness or not. Mr. Bowser's attorney argued the fees were not reasonable, stating, “he's not going to be a witness in this case. They spent a lot of money for nothing....”

Ms. Bowser, in fact, did not call Mr. Mensel as a witness. Mr. Bowser presented the testimony of his

accountant, Mr. Regeon, who testified he had prepared tax returns for Mr. Bowser's business and the statements of financial condition filed with the state contractor's licensing board for a number of years. Those documents were introduced into evidence.

The trial court ordered that each party be responsible for his or her own attorney's fees and directed that all costs and attorney's fees be paid from the proceeds of the sale of real property "with the exception of the fees due Mr. David Mensel, for which the Plaintiff will be solely responsible." In her motion to alter or amend, Ms. Bowser asserted the trial court's ruling with regard to the payment of Mr. Mensel's fee was unclear, ambiguous, and in need of clarification. This was the only mention in this motion of Mr. Mensel. The court found:

> The Court nor anyone else received any enlightenment from any of the work performed by Mr. David Mensel, CPA. Therefore, any charges submitted by him for payment should not be paid from the proceeds of the marital home.

After Ms. Bowser changed counsel, two motions for clarification and to consider post-judgment facts were filed, the second of which addressed the trial court's ruling on Mr. Mensel's fee. In part, the motion states:

> That after spending $5,000 in retainer and incurring another $9,700 in fees for Mr. Mensel, Plaintiff would submit that his report should be considered. That Plaintiff would respectfully request that the Report from Mr. Mensel be a part of the record and marked as an exhibit in this cause and his statement of fees introduced for consideration by the Court of Appeals.

***17** The trial court denied this request "[b]ecause no proof was entered at trial regarding the findings of David Mensel, CPA, and because the Defendant [Mr. Bowser] was given no opportunity to cross-examine or depose Mr. Mensel...."

On appeal, Ms. Bowser states that she asked the trial court to be allowed to supplement the record with the report of the forensic accountant she hired to review the books of John Bowser Homebuilder. Her brief then states:

> Ms. Bowser argued that her trial counsel should have introduced the report in support of her argument that Mr. Bowser's income was greater than he actually reported and to supply the court with expert proof regarding the value of the business. This case should be remanded so that Ms. Bowser can present proof as to Mr. Bowser's actual earnings and the value of the business.

The trial court quite correctly refused to supplement the record with a report that was not introduced at trial and, therefore, not part of the evidence considered by the court in reaching its decisions. The report was not a post-judgment fact; it was evidence not offered at trial.

It is not perfectly clear from the record that Ms. Bowser asked the trial court for a new trial and a new opportunity to present the accountant's report and testimony, as opposed to asking the court to reconsider its order on Mr. Mensel's fees. If she did not present this issue to the trial court, she cannot raise it for the first time on appeal. Generally, this court will not entertain an issue on appeal that was not raised in the court below. *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 153 (Tenn.1991) (citing *Lovell v. Metro. Gov't*, 696 S.W.2d 2 (Tenn.1985)); *Davis v. Tennesseean*, 83 S.W.3d 125, 127 (Tenn.Ct.App.2001); *Harlan v. Hardaway*, 796 S.W.2d 953, 957 (Tenn.Ct.App.1990). Numerous Tennessee cases hold that an issue raised for the first time on appeal is waived. *See, e.g.*, *Norton v. McCaskill*, 12 S.W.3d 789, 795 (Tenn.2000); *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn.1983)

(noting, "It has long been the general rule that questions not raised in the trial court will not be entertained on appeal...."). An issue not presented to, decided, or dealt with by the trial court will not be considered by appellate courts. *In re Adoption of a Female Child*, 42 S.W.3d 26, 32 (Tenn.2001); *Reid v. State*, 9 S.W.3d 788, 796 (Tenn.Ct.App.1999).

Even if she did ask the trial court for a new trial and can raise the issue in this court, Ms. Bowser is not entitled to a new trial and a new determination of the value of the business on the basis of the report. With regard to granting a new trial under a Tenn. R.App. P. Rule 59.04 Motion to Alter or Amend Judgment:

> To justify a new trial for newly discovered evidence it must be shown that the new evidence was not known to the moving party prior to or during trial and that it could not have been known to him through exercise of reasonable diligence.
>
> ***18** Thus, an attorney has a duty to investigate prior to trial, *Tipton v. Smith*, 593 S.W.2d 298 (Tenn.App.1979); *Brown v. University Nursing Home, Inc.*, 496 S.W.2d 503 (Tenn.App.1972); *City of Knoxville v. Ryan*, 13 Tenn.App. 186 (1929); *Demonbreun v. Walker*, 63 Tenn. 199 (1874); *Tabler v. Connor*, 60 Tenn. 195 (1873), to call appropriate witnesses at trial, *Zirkle v. Stegall*, 163 Tenn. 323, 43 S.W.2d 192 (1931); *Wilson v. Nashville C. & St. L. Ry.*, 16 Tenn.App. 695, 65 S.W.2d 637 (1933); *Stafford v. Stafford*, 1 Tenn.App. 477 (1926); *Ware v. State*, 108 Tenn. 466, 67 S.W. 853 (1902), to fully examine all witnesses, *Noel v. McCrory*, 47 Tenn. 623 (1868); *Luna v. Edmiston*, 37 Tenn. 159 (1857); *Darnell v. McNichols*, 22 Tenn.App. 287, 122 S.W.2d 808 (1938), and to secure evidence of which counsel becomes aware at trial. *Bradshaw v. Holt*, 200 Tenn. 249, 292 S.W.2d 30 (1956); *Southwestern Transp. Co. v. Waters*, 168 Tenn. 596, 79 S.W.2d 1028 (1935); *Whitfield v. Loveless*, 1 Tenn.App. 377 (1925). The client is also under a duty to act with due diligence in securing evidence for trial. *Hayes v. Cheatham*, 74 Tenn. 1 (1880); *Harbour v. Rayburn*, 15 Tenn. 432 (1835); *Puckett v. Laster*, 56 Tenn.App. 66, 405 S.W.2d 35 (1965); *Spence v. Carne*, 40 Tenn.App. 580, 292 S.W.2d 438 (1954).
>
> *Seay v. City of Knoxville*, 654 S.W.2d 397, 399 (Tenn.Ct.App.1983) (some citations omitted).

Ms. Bowser admits in her brief that her attorney should have admitted the accounting evidence at trial. Upon obtaining new counsel after the trial, Ms. Bowser filed a Second Motion for Clarification and to Consider Post Judgment Facts and to Supplement the Record on Appeal, on May 24, 2001, stating that "Mr. Mensel completed an evaluation [of] the Bowser Construction business 'John Bowser Homebuilder' and was prepared to provide testimony regarding Mr. Bowser's real income." Consequently, the evidence she now seeks to have considered by this court on appeal was evidence that was available at trial, but according to the transcript of the proceedings, Ms. Bowser's counsel at that time chose not to use. Thus, this evidence is not "newly discovered evidence" as is required to warrant a new trial under Tenn. R.App. P. Rule 59.04.

V. Attorney's Fees

Finally, Ms. Bowser asserts that the trial court should have ordered Mr. Bowser to pay her attorney's fees rather than directing that the fees be paid out of the proceeds of the sale of real property. She also asserts that the court's order that some of Mr. Bowser's attorney's fees from those proceeds resulted in her paying 46.71% of her husband's remaining fees.[FN12]

> FN12. She arrives at this conclusion in part because, she states, she purchased the marital residence at auction. That fact is not apparent from the record before us. It would make no difference in our analysis of the issue, however, because the trial court simply ordered

> that the fees be paid from the proceeds of the auction and did not order Ms. Bowser to purchase the house or to pay additional fees because of that purchase.

An award of attorney's fees in divorce cases is considered alimony or spousal support, generally characterized as alimony *in solido*. *Yount v. Yount*, 91 S.W.3d 777, 783 (Tenn.Ct.App.2002); *Miller v. Miller*, 81 S.W.3d 771, 775 (Tenn.Ct.App.2001); *Wilder v. Wilder*, 66 S.W.3d 892, 894 (Tenn.Ct.App.2001); *Kinard*, 986 S.W.2d at 235-36; *Smith*, 984 S.W.2d at 610; *Long v. Long*, 957 S.W.2d 825, 829 (Tenn.Ct.App.1997); *Herrera v. Herrera*, 944 S.W.2d 379, 390 (Tenn.Ct.App.1996); *Smith v. Smith*, 912 S.W.2d 155, 161 (Tenn.Ct.App.1995); *Storey v. Storey*, 835 S.W.2d 593, 597 (Tenn.Ct.App.1992); *Cranford*, 772 S.W.2d at 52, *overruled on other grounds by Bogan*, 60 S.W.3d at 730; *Gilliam v. Gilliam*, 776 S.W.2d 81, 86 (Tenn.Ct.App.1988).

***19** Because attorney's fees are considered alimony or spousal support, an award of such fees is subject to the same factors that must be considered in the award of any other type of alimony. *Yount*, 91 S.W.3d at 783; *Lindsey v. Lindsey*, 976 S.W.2d 175, 181 (Tenn.Ct.App.1997). Therefore, the statutory factors listed in Tenn.Code Ann. § 36-5-0101(d)(1) are to be considered in a determination of whether to award attorney's fees. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 751 (Tenn.2000); *Kincaid*, 912 S .W.2d at 144. There are no hard and fast rules for spousal support decisions, and such determinations require a "careful balancing" of the relevant factors. *Anderton*, 988 S.W.2d at 682-83. Initial decisions regarding the entitlement to spousal support, as well as the amount and duration of spousal support, hinge on the unique facts of each case and require a careful balancing of all relevant factors. *Robertson*, 76 S.W.3d at 338.

As with other forms of spousal support, the need of the spouse requesting the award of attorney's fees is the single most important factor. *Miller*, 81 S.W.3d at 775; *Watters*, 22 S.W.3d at 821. The obligor spouse's ability to pay is also an important consideration. *Miller*, 81 S.W.3d at 775; *Hazard v. Hazard*, 833 S.W.2d 911, 917 (Tenn.Ct.App.1991). Courts have held that in determining whether to award attorney's fees as spousal support, the most important factors are the real need of the disadvantaged spouse, a demonstrated financial inability to obtain counsel, and the ability of the obligor spouse to pay. *Wilder*, 66 S.W.3d at 895; *Cranford*, 772 S.W.2d at 50. In a recent opinion, the Supreme Court stated that an award of attorney's fees "is conditioned upon a lack of resources to prosecute or defend a suit in good faith ..." and that such an award is to ensure access to the courts. *Langschmidt*, 81 S.W.3d at 751 (quoting *Fox v. Fox*, 657 S.W.2d 747, 749 (Tenn.1983)). Consequently, a spouse with adequate property and income is not entitled to an award of additional alimony to compensate for attorney's fees and expenses. *Lindsey*, 976 S.W.2d at 181; *Umstot v. Umstot*, 968 S.W.2d 819, 824 (Tenn.Ct.App.1997); *Houghland v. Houghland*, 844 S.W.2d 619, 623-24 (Tenn.Ct.App.1992); *Duncan v. Duncan*, 686 S.W.2d 568, 573 (Tenn.Ct.App.1984).

The trial court herein gave a thorough and accurate statement of the applicable legal principles, citing many of the authorities set out herein. Applying those principles to the facts of this case, the court concluded:

> It is clear that [Ms. Bowser] has received a larger portion of the marital assets which are in the form of liquidated cash and has assumed no indebtedness. It is clear that [Ms. Bowser] shall receive a larger portion of the net proceeds from the sale of the parties' real property. Therefore, the Court finds that there is no reason why the parties should not be responsible for their respective attorney fees....

***20** Although stating that each party would be responsible for his or her attorney's fees, the court then directed that "any unpaid balances toward fees of both parties" would be deducted from the proceeds of the

sale of the real property before distribution of the remainder to the parties.[FN13]

FN13. The court specifically excluded fees due and payable to Mr. Mensel from this deduction and directed that those fees be paid solely by Ms. Bowser. Her filings indicate those fees total over $14,000.

In a later order, the court clarified its order, stating all of Ms. Bowser's fees owed by her to her attorney were to be paid from the proceeds of the sale of the marital home and that only that portion of Mr. Bowser's attorney's fees that were still unpaid were to be deducted. The court specifically held that any attorney's fees already paid by Mr. Bowser were not to be reimbursed to him from the proceeds of the sale of the marital home. The trial court also ordered that all of Ms. Bowser's attorney's fees owed to her trial counsel, including that related to working with Mr. Mensel, were to be paid from joint funds. [FN14]

FN14. This ruling allowed fees for attorney time consulting with and reviewing and directing the work of the accountant, while leaving in place the order that none of the accountant's fees themselves be paid from the proceeds.

According to Ms. Bowser's attorney's affidavit she incurred $32,783.15, and had an outstanding balance of $26,810.65 in attorney's fees. In her brief, Ms. Bowser states her attorney's fees were $33,000. Mr. Bowser's attorney's affidavit stated that Mr. Bowser had unpaid legal fees in the amount of $2,276.20.

Although the court found that each party should be responsible for his or her own fees, the court did not order that each party's fees would be deducted from only that party's share of the proceeds. Because the remaining proceeds were to be divided 53.29% / 46.71% between the parties, the result of the order that the fees be deducted first was that each party paid a share of the other's fees.

This situation operated to Ms. Bowser's advantage because the total of her fees payable from the proceeds was significantly larger than the amount of Mr. Bowser's fees allowed by the court. Thus, while it could be accurately stated that as a result of the court's orders she paid 53% of Mr. Bowser's $2,276 in fees, it would also be accurate to state that Mr. Bowser paid 47% of the $32,700 she incurred in fees.[FN15]

FN15. It is not clear to us whether the entire $32,783.15 was to be deducted from the proceeds or only the $26,810.65 balance, or, even, some other final number. Nonetheless, the principle is the same: Mr. Bowser's share of the proceeds was reduced by a portion of Ms. Bowser's much more substantial fees.

An award of attorney's fees as alimony is considered to be within the sound discretion of the trial court, *Loyd v. Loyd*, 860 S.W.2d 409, 413 (Tenn.Ct.App.1993); *Wallace*, 733 S.W.2d at 110-11, and such an award will not be reversed on appeal if the trial court acted within its discretion. *Yount*, 91 S.W.3d at 783; *Garfinkle v. Garfinkle*, 945 S.W.2d 744, 748 (Tenn.Ct.App.1996); *Lyon v. Lyon*, 765 S.W.2d 759, 762-63 (Tenn.Ct.App.1988). The Tennessee Supreme Court has made it clear that "[t]he allowance of attorney's fees is largely in the discretion of the trial court, and the appellate court will not interfere except upon a clear showing of abuse of that discretion." *Aaron*, 909 S.W.2d at 411 (citing *Storey*, 835 S.W.2d at 597 and *Crouch v. Crouch*, 53 Tenn.App. 594, 606, 385 S.W.2d 288, 293 (Tenn.Ct.App.1964)).

Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to the propriety of the decision

> made." A trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

***21** *Eldridge v. Eldridge,* 42 S.W.3d 82, 85 (Tenn.2001) (citations omitted).

The trial court herein acted within its discretion in its orders regarding attorney's fees. It applied the correct legal standard, reached a decision which is reasonable in light of the substantial fees involved and the parties' property, and we cannot find that any injustice was caused to Ms. Bowser. We affirm the trial court's decision regarding attorney's fees.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's determination that the parties were married in 1984 according to the common law of Ohio; affirm the trial court's distribution of marital and separate property; modify the trial court's order to award Ms. Bowser rehabilitative alimony in the amount of $500 per month for five years; affirm the trial court's decision refusing to supplement the record with a report that was not introduced at trial; and affirm the trial court's decision regarding attorney's fees. We remand for any further proceedings that may be necessary. Costs of the appeal are assessed equally between the appellant, Sue Ann Bowser and the appellee, John M. Bowser.

Tenn.Ct.App.,2003.
Bowser v. Bowser
Not Reported in S.W.3d, 2003 WL 1542148 (Tenn.Ct.App.)

END OF DOCUMENT

--- F.Supp.2d ----, 2014 WL 1418395 (S.D.Ohio)
(Cite as: 2014 WL 1418395 (S.D.Ohio))

H

Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio.
Brittani HENRY, et al., Plaintiffs,
v.
Lance HIMES, et al., Defendants.

No. 1:14–cv–129.
Signed April 14, 2014.

Background: Same-sex couples married in jurisdictions that provided for such marriages brought action against state officials, alleging ban on same-sex marriages in Ohio violated the Fourteenth Amendment. Couples moved for declaratory judgment and permanent injunction.

Holdings: The District Court, Timothy S. Black, J., held that:
(1) intermediate scrutiny applied;
(2) Ohio's interest in "preserving the traditional definition of marriage" was not a legitimate justification;
(3) Ohio's refusal to recognize same-sex marriages performed in other jurisdictions was not justified under heightened or rational basis review by its preference for procreation or childrearing by heterosexual couples; and
(4) refusal to recognize same-sex marriages performed in other jurisdictions caused irreparable harm.

Motion granted.

West Headnotes

[1] Civil Rights 78 1450

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1450 k. In General. Most Cited Cases

A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law.

[2] Injunction 212 1009

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(A) Nature, Form, and Scope of Remedy
212k1008 Discretionary Nature of Remedy
212k1009 k. In General. Most Cited Cases

It lies within the sound discretion of a district court to grant or deny a motion for permanent injunction.

[3] Constitutional Law 92 4384

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)18 Families and Children
92k4383 Marital Relationship
92k4384 k. In General. Most Cited Cases

While states have a legitimate interest in regulating and promoting marriage, the fundamental right to marry protected by the Fourteenth Amendment due process clause belongs to the individual. U.S.C.A. Const.Amend. 14.

--- F.Supp.2d ----, 2014 WL 1418395 (S.D.Ohio)
(Cite as: 2014 WL 1418395 (S.D.Ohio))

[4] Constitutional Law 92 4384

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)18 Families and Children
92k4383 Marital Relationship
92k4384 k. In General. Most Cited Cases

Constitutional Law 92 4475

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)25 Other Particular Issues and Applications
92k4475 k. In General. Most Cited Cases

Under Fourteenth Amendment due process, the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 1052

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1052 k. Fundamental Rights. Most Cited Cases

Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.

[6] Constitutional Law 92 3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and Civil Unions. Most Cited Cases

Intermediate scrutiny applied in action alleging Ohio's ban on same-sex marriages violated Fourteenth Amendment substantive due process. U.S.C.A. Const.Amend. 14; Const. Art. 15, § 11; R.C. § 3101.01(C).

[7] Constitutional Law 92 1045

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)5 Effect of Determination
92k1045 k. In General. Most Cited Cases

Unconstitutional laws cannot stand, even when passed by popular vote.

[8] Constitutional Law 92 4385

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)18 Families and Children
92k4383 Marital Relationship
92k4385 k. Same-Sex Marriage. Most Cited Cases

--- F.Supp.2d ----, 2014 WL 1418395 (S.D.Ohio)
(Cite as: 2014 WL 1418395 (S.D.Ohio))

Marriage 253 17.5(2)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(2) k. Effect of Foreign Union. Most Cited Cases

Ohio's interest in "preserving the traditional definition of marriage" was not a legitimate justification for its refusal to recognize same-sex marriages validly performed in other jurisdictions, and, therefore, refusal was unconstitutional on its face as in violation of Fourteenth Amendment substantive due process; marriage laws implicated individuals' property, inheritance, and family interests, which included identifying parents on birth certificates. U.S.C.A. Const.Amend. 14; Const. Art. 15, § 11; R.C. § 3101.01(C).

[9] Constitutional Law 92 4384

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)18 Families and Children
92k4383 Marital Relationship
92k4384 k. In General. Most Cited Cases

State regulation of marriage is subject to constitutional guarantees and the fact that each state has the exclusive power to create marriages within its territory does not logically lead to the conclusion that states can nullify already-established marriages absent due process of law. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law 92 3082

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3069 Particular Classes
92k3082 k. Sexual Orientation. Most Cited Cases

Classifications based on sexual orientation must pass muster under heightened scrutiny to survive constitutional challenge under Fourteenth Amendment equal protection. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 92 3438

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3436 Families and Children
92k3438 k. Marriage and Civil Unions. Most Cited Cases

Marriage 253 17.5(2)

253 Marriage
253k17.5 Same-Sex and Other Non-Traditional Unions
253k17.5(2) k. Effect of Foreign Union. Most Cited Cases

Ohio's refusal to recognize same-sex marriages validly performed in other jurisdictions was not justified under heightened or rational basis review by Ohio's preference for procreation or childrearing by heterosexual couples, and, therefore, refusal was unconstitutional on its face as in violation of Fourteenth Amendment equal protection; overwhelming scientific consensus, based on decades of peer-reviewed scientific research, showed that children raised by same-sex couples were just as well adjusted as those raised by heterosexual couples. U.S.C.A. Const.Amend. 14; Const. Art. 15, § 11; R.C. § 3101.01(C).

--- F.Supp.2d ----, 2014 WL 1418395 (S.D.Ohio)
(Cite as: 2014 WL 1418395 (S.D.Ohio))

[12] Civil Rights 78 1456

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1456 k. Other Particular Cases and Contexts. Most Cited Cases

Declaratory Judgment 118A 92.1

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(B) Status and Legal Relations
118Ak92 Marital Status
118Ak92.1 k. In General. Most Cited Cases

Declaratory Judgment 118A 387

118A Declaratory Judgment
118AIII Proceedings
118AIII(G) Judgment
118Ak386 Executory or Coercive Relief
118Ak387 k. Injunction. Most Cited Cases

Ohio's refusal to recognize same-sex marriages performed in other jurisdictions in violation of Fourteenth Amendment substantive due process and equal protection caused irreparable harm to same-sex couples validly married outside Ohio, and, therefore, warranted declaratory relief and permanent injunction prohibiting enforcement of laws that banned recognition of those marriages; refusal to recognize marriages implicated couples' property, inheritance, and family interests, which included identifying parents on birth certificates, and, without injunction, couples would suffer delays, bureaucratic complications, increased costs, and invasions of privacy, including questioning their legal status as parents. U.S.C.A. Const.Amend. 14; Const. Art. 15, § 11; R.C. § 3101.01(C).

West Codenotes
Held UnconstitutionalR.C. § 3101.01(C)Const. Art. 15, § 11Alphonse Adam Gerhardstein, Jacklyn Gonzales Martin, Jennifer Lynn Branch, Gerhardstein & Branch Co. LPA, Lisa Talmadge Meeks, Newman & Meeks Co. LPA, Ellen Essig, Cincinnati, OH, Marshall Currey Cook, Susan L. Sommer, Lambda Legal Defense and Education Fund, Inc., New York, NY, Paul D. Castillo, Lambda Legal Defense and Education Fund, Inc., Dallas, TX, for Plaintiffs.

Peter J. Stackpole, City of Cincinnati, Cincinnati, OH, Bridget C. Coontz, Ryan L. Richardson, Zachery Paul Keller, Ohio Attorney General, Columbus, OH, for Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

TIMOTHY S. BLACK, District Judge.

***1** On December 23, 2013, this Court ruled in no uncertain terms that:

> "Article 15, Section 11, of the Ohio Constitution, and Ohio Revised Code Section 3101.01(C) [Ohio's "marriage recognition bans"], violate rights secured by the Fourteenth Amendment to the United States Constitution in that same-sex couples married in jurisdictions where same-sex marriage is lawful, who seek to have their out-of-state marriage recognized and accepted as legal in Ohio, are denied their fundamental right to marriage recognition without due process of law; and are denied their fundamental right to equal protection of the laws when Ohio does recognize comparable heterosexual marriages from other jurisdictions, even if obtained to circumvent Ohio law."

Obergefell v. Wymyslo, 962 F.Supp.2d 968, 997 (S.D.Ohio 2013).

The *Obergefell* ruling was constrained by the limited relief requested by the Plaintiffs in that case, but the analysis was nevertheless universal and unmitigated, and it directly compels the Court's conclusion today. The record before the Court, which includes the judicially-noticed record in *Obergefell,* is staggeringly devoid of any legitimate justification for the State's ongoing arbitrary discrimination on the basis of sexual orientation, and, therefore, ***Ohio's marriage recognition bans are facially unconstitutional and unenforceable under any circumstances.*** [FN1]

It is this Court's responsibility to give meaning and effect to the guarantees of the federal constitution for all American citizens, and that responsibility is never more pressing than when the fundamental rights of some minority of citizens are impacted by the legislative power of the majority. As the Supreme Court explained over 70 years ago:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other ***fundamental rights may not be submitted to vote; they depend on the outcome of no elections.***

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (emphasis supplied). This principle is embodied by the Court's decision today and by the ***ten out of ten federal rulings* since the Supreme Court's holding in *United States v. Windsor—all declaring unconstitutional and enjoining similar bans in states across the country.*** [FN2] The pressing and clear nature of the ongoing constitutional violations embodied by these kinds of state laws is evidenced by the fact the Attorney General of the United States and eight state attorneys general have refused to defend provisions similar to Ohio's marriage recognition bans. (Doc. 25 at 2).

This civil action is now before the Court on Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction (Doc. 18) and the parties' responsive memoranda. (Docs. 20 and 25). Plaintiffs include four same-sex couples married in jurisdictions that provide for such marriages, including three female couples who are expecting children conceived via anonymous donors within the next few months and one male couple with an Ohio-born adopted son. All four couples are seeking to have the names of both parents recorded on their children's Ohio birth certificates. More specifically, Plaintiffs seek a declaration that Ohio's refusal to recognize valid same-sex marriages is unconstitutional, a permanent injunction prohibiting Defendants and their officers and agents from enforcing those bans or denying full faith and credit to decrees of adoption duly obtained by same-sex couples in other jurisdictions, and the issuance of birth certificates for the Plaintiffs' children listing both same-sex parents. (Doc. 18 at 1–2).

I. ESTABLISHED FACTS

A. Marriage Law in Ohio [FN3]

***2** The general rule in the United States for interstate marriage recognition is the "place of celebration rule," or *lex loci contractus,* which provides that marriages valid where celebrated are valid everywhere. Historically, Ohio has recognized marriages that would be invalid if performed in Ohio, but are valid in the jurisdiction where celebrated. This is true even when such marriages clearly violate Ohio law and are entered into outside of Ohio with the purpose of evading Ohio law with respect to marriage. Ohio departed from this tradition in 2004 to adopt its marriage recognition ban. Prior to 2004, the Ohio legislature had never passed a law denying recognition to a specific type of marriage solemnized outside of the state.

Ohio Revised Code Section 3101 was amended in

2004 to prohibit same-sex marriages in the state and to prohibit recognition of same-sex marriages from other states. Sub-section (C) provides the following:

> (1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.
>
> (2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.
>
> (3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes is void ab initio ...
>
> (4) Any public act, record, or judicial proceeding of any other state, country, or other jurisdiction outside this state that extends the specific benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

Ohio Rev.Code Ann. § 3101.01.

Also adopted in 2004 was an amendment to the Ohio Constitution, which states:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Ohio Const. art. XV, § 11.

B. Plaintiffs

1. Henry/Rogers Family[FN4]

Plaintiffs Brittani Henry and Brittni Rogers met in 2008. They have been in a loving, committed same-sex relationship since that time. On January 17, 2014, they were validly married in the state of New York, which state legally recognizes their marriage. Having established a home together and enjoying the support of their families, the couple decided they wanted to have children. Henry became pregnant through artificial insemination ("AI"), and she is due to deliver a baby boy in June 2014. The sperm donor is anonymous. Without action by this Court, Defendants Jones and Himes will list only one of these Plaintiffs as their son's parent on his birth certificate.

2. Yorksmith Family[FN5]

***3** Nicole and Pam Yorksmith met and fell in love in 2006. They were married on October 14, 2008 in California, which state legally recognizes their marriage. The Yorksmith family already includes a three-year-old son born in Cincinnati in 2010. He was conceived through AI using an anonymous sperm donor. Nicole is their son's birth mother, but Pam was fully engaged in the AI process, pregnancy, and birth. They share the ongoing role as parents. However, only Nicole is listed on their son's birth certificate because Defendants will not list the names of both same-sex married parents on the birth certificates of their children conceived through AI.

Failing to have both parents listed on their son's birth certificate has caused the Yorksmith Family great concern. They have created documents attempting to ensure that Pam will be recognized with authority to approve medical care, deal with childcare workers and teachers, travel alone with their son, and otherwise address all the issues parents must resolve. Nicole and Pam allege that Defendants' denial of recognition of Pam's role as parent to their child is degrading and humiliating for the family.

Now Nicole is pregnant with their second child. She expects to give birth in June in Cincinnati. Nicole and Pam are married and will continue to be a married couple when their second child is born, but Defendants have taken the position that they are prohibited under Ohio law from recognizing the California marriage and both married spouses on the birth certificate of the Yorksmiths' baby boy. Without action by this Court, Defendants Jones and Himes will list only one of these Plaintiffs as their son's parent on his birth certificate.

3. Noe/McCracken Family[FN6]

Plaintiffs Kelly Noe and Kelly McCracken have been in a loving, committed same-sex relationship since 2009. From the beginning of their time together, they agreed that they would have children. They were married in 2011 in the state of Massachusetts, which legally recognizes their marriage. Noe became pregnant through AI using an anonymous sperm donor. She expects to deliver a baby in a Cincinnati hospital in June 2014. McCracken consented to and was a full participant in the decision to build their family using AI. Noe and McCracken are married now and will continue to be a married couple when their child is born, but Defendants have taken the position that they are prohibited under Ohio law from recognizing the Massachusetts marriage and the marital presumption of parentage that should apply to this family for purposes of naming both parents on the baby's birth certificate. Without action by this Court, Defendants Jones and Himes will list only one of these Plaintiffs as a parent on the baby's birth certificate when the child is born.

4. Vitale/Talmas Family[FN7]

Plaintiffs Joseph J. Vitale and Robert Talmas met in 1997. They live in New York City, where they work as corporate executives. Vitale and Talmas married on September 20, 2011 in New York, which state legally recognizes their marriage. The couple commenced work with Plaintiff Adoption S.T.A.R. to start a family through adoption. Adopted Child Doe was born in Ohio in 2013 and custody was transferred to Plaintiff Adoption S.T.A.R. shortly after birth. Vitale and Talmas immediately assumed physical custody and welcomed their son into their home. On January 17, 2014, an Order of Adoption of Adopted Child Doe was duly issued by the Surrogate's Court of the State of New York, County of New York, naming both Vitale and Talmas as full legal parents of Adopted Child Doe.

***4** Plaintiffs are applying to the Ohio Department of Health, Office of Vital Statistics, for an amended birth certificate listing Adopted Child Doe's adoptive name and naming Vitale and Talmas as his adoptive parents. Based on the experience of Plaintiff Adoption S.T.A.R. with other clients and their direct communications with Defendant Himes's staff at the Ohio Department of Health, Adopted Child Doe will be denied a birth certificate that lists both men as parents. On the other hand, heterosexual couples married in New York who secure an order of adoption from a New York court regarding a child born in Ohio have the child's adoptive name placed on his or her birth certificate along with the names of both spouses as the parents of the adoptive child as a matter of course.

Without action by this Court, Defendant Himes will allow only one of these Plaintiffs to be listed as the parent on the birth certificate of Adopted Child Doe. Vitale and Talmas object to being forced to choose which one of them to be recognized as their

son's parent and to allowing this vitally important document to misrepresent the status of their family. They do not wish to expose their son to the life-long risks and harms they allege are attendant to having only one of his parents listed on his birth certificate.

5. Adoption S.T.A.R.[FN8]

Plaintiffs allege that prior to Governor Kasich, Attorney General DeWine, and prior-Defendant Wymyslo taking office in January, 2011, the Ohio Department of Health provided same-sex married couples such as Plaintiffs Vitale and Talmas with birth certificates for their adopted children, consistent with those requested in the Complaint. (Doc. 1). Defendant Himes has changed that practice, and now denies married same-sex couples with out-of-state adoption decrees amended birth certificates for their Ohio-born children naming both adoptive parents. (*See* Docs. 4–6, 4–7, and 4–8).

As a result of Ohio's practice of not amending birth certificates for the adopted children of married same-sex parents, Plaintiff Adoption S.T.A.R. alleges it has been forced to change its placement agreements to inform potential same-sex adoptive parents that they will not be able to receive an accurate amended birth certificate for adopted children born in Ohio. Adoption S.T.A.R. alleges it has expended unbudgeted time and money to change its agreements and advise same-sex adoptive parents of Ohio's discriminatory practice. It alleges it has devoted extra time and money to cases like that of Plaintiffs Vitale and Talmas involving same-sex married couples who adopt children born in Ohio through court actions in other states. Adoption S.T.A.R. alleges that the process to seek an accurate birth certificate for Adopted Child Doe—including participation in this lawsuit—is expected to be a protracted effort that will cause the expenditure of extra time and money.

Adoption S.T.A.R. has served same-sex married couples in previous adoption cases and is currently serving other same-sex married couples in various stages of the adoption process in other states for children born in Ohio. Adoption S.T.A.R. alleges it will serve additional same-sex married couples in this capacity in the future. Adoption S.T.A.R. alleges that its clients' inability to secure amended birth certificates from Defendant Himes accurately listing both same-sex married persons as the legal parents of their adopted children imposes a significant burden on the agency's ability to provide adequate and equitable adoption services to its clients, results in incomplete adoptions and loss of revenue, and frustrates the very purpose of providing adoption services to its clients in the first place.

II. STANDARD OF REVIEW

***5** Plaintiffs go beyond the as-applied challenge pursued in *Obergefell* and now seek a declaration that Ohio's marriage recognition ban is facially unconstitutional, invalid, and unenforceable. (Doc. 18 at 15). In other words, Plaintiffs allege that "no set of circumstances exists under which the [challenged marriage recognition ban] would be valid," and the ban should therefore be struck down in its entirety. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); *see also De Leon v. Perry*, SA1 3–CA–00982–OLG, 2014 WL 715741 (W.D.Tex. Feb.26, 2014) (declaring that Texas's ban on same-sex marriages and marriage recognition "fails the constitutional facial challenge because ... Defendants have failed to provide any—and the Court finds no—rational basis that banning same-sex marriage furthers a legitimate governmental interest").

[1][2] "A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer continuing irreparable injury for which there is no adequate remedy at law." *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 583 (6th Cir.2012); *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir.2006) (citing *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir.1998)); *Obergefell*, 962 F.Supp.2d at 977. It lies within the sound discretion of the district court to

grant or deny a motion for permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006); *Obergefell*, 962 F.Supp.2d at 977 (citing *Kallstrom*, 136 F.3d at 1067); *Wayne v. Vill. of Sebring*, 36 F.3d 517, 531 (6th Cir.1994).

The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. Fed.R.Civ.P. 57. In the Sixth Circuit, "[t]he two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Savoie v. Martin*, 673 F.3d 488, 495–96 (6th Cir.2012) (quoting *Grand Trunk W. R.R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir.1984)); *see also Obergefell*, 962 F.Supp.2d at 977. Both circumstances arise here.

III. ANALYSIS

This Court has already held in *Obergefell* that Ohio's refusal to recognize the outof-state marriages of same-sex couples violates the Fourteenth Amendment due process "right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections." 962 F.Supp.2d at 978. In the birth certificate context, much like in the death certificate context, the marriage recognition ban denies same-sex married couples the "attendant benefits and protections" associated with state marriage recognition and documentation. This Court further held in *Obergefell* that the marriage recognition ban "violate[s] Plaintiffs' constitutional rights by denying them equal protection of the laws." *Id.* at 983. Finally, this Court declared the marriage recognition ban unconstitutional and unenforceable in the death certificate context.

***6** The Court's analysis in *Obergefell* controls here, and compels not only the conclusion that the marriage recognition ban is unenforceable in the birth certificate context, but that it is facially unconstitutional and unenforceable in any context whatsoever.

A. Facial Challenge

Despite the limited relief pursued by the Plaintiffs in that case, this Court's conclusion in *Obergefell* clearly and intentionally expressed the facial invalidity of Ohio's marriage recognition ban, not only as applied to the Plaintiffs and the issue of death certificates, but in any application to any married same-sex couple. 962 F.Supp.2d at 997. Ohio's marriage recognition ban embodies an unequivocal, purposeful, and explicitly discriminatory classification, singling out same-sex couples alone, for disrespect of their out-of-state marriages and denial of their fundamental liberties. This classification, relegating lesbian and gay married couples to a second-class status in which *only their marriages* are deemed void in Ohio, is the core constitutional violation all of the Plaintiffs challenge.

The United States Constitution "neither knows nor tolerates classes among citizens." *Romer v. Evans*, 517 U.S. 620, 623, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (emphasis supplied). There can be no circumstance under which this discriminatory classification is constitutional, as it was intended to, and on its face does, stigmatize and disadvantage same-sex couples and their families, denying only to them protected rights to recognition of their marriages and violating the guarantee of equal protection. Indeed, this Court already held as much in *Obergefell*, finding that Ohio enacted the marriage recognition bans with discriminatory animus and without a single legitimate justification. 962 F.Supp.2d at 995.

As noted, following the Supreme Court's ruling in *Windsor v. United States*, —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), a spate of federal courts from across the nation has issued rulings similar to *Obergefell*, holding that a state's ban on the right of same-sex couples to marry or to have their out-of-state

marriages recognized violates the constitutional due process and equal protection rights of these families. There is a growing national judicial consensus that state marriage laws treating heterosexual and same-sex couples differently violate the Fourteenth Amendment, and it is this Court's responsibility to act decisively to protect rights secured by the United States Constitution.

The Supreme Court explained in *Citizens United v. Federal Election Commission* that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). The distinction between the two "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Id.* Even in a case explicitly framed only as an as-applied challenge (which this case is not), the Court has authority to facially invalidate a challenged law. " '[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases.' " *Id.* at 331 (quoting Richard H. Fallon, Jr., *As–Applied and Facial Challenges and ThirdParty Standing*, 113 HARV. L.REV.. 1321, 1339 (2000)).

***7** It is therefore well within the Court's discretion to find the marriage ban facially unconstitutional and unenforceable in all circumstances on the record before it, and given the Court's extensive and comprehensive analysis in *Obergefell* pointing to the appropriateness of just such a conclusion, Defendants have been on notice of the likely facial unconstitutionality of the marriage ban since before this case was ever filed.

B. Due Process Clause

The Due Process Clause of the Fourteenth Amendment establishes that no state may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Due Process Clause protects "vital personal rights essential to the orderly pursuit of happiness by free men," more commonly referred to as "fundamental rights." *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). There are a number of fundamental rights and/or liberty interests protected by the Due Process clause that are implicated by the marriage recognition ban, including the right to marry, the right to remain married,[FN9] and the right to parental autonomy.

1. Right to Marry

"The freedom to marry has long been recognized" as a fundamental right protected by the Due Process Clause. *Loving*, 388 U.S. at 12 (1967). [FN10] Some courts have not found that a right to same-sex marriage is implicated in the fundamental right to marry. *See, e.g., Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1094–98 (D.Haw.2012).[FN11] However, neither the Sixth Circuit nor the Supreme Court have spoken on the issue, and this Court finds no reasonable basis on which to exclude gay men, lesbians, and others who wish to enter into same-sex marriages from this culturally foundational institution.

[3][4] First, while states have a legitimate interest in regulating and promoting marriage, the fundamental right to marry belongs to the individual. Accordingly, ***"the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made."*** *Hodgson v. Minnesota*, 497 U.S. 417, 435, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990) (emphasis supplied); *see also Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's

spouse ...").

The Supreme Court has consistently refused to narrow the scope of the fundamental right to marry by reframing a plaintiff's asserted right to marry as a more limited right that is about the characteristics of the couple seeking marriage. In individual cases regarding parties to potential marriages with a wide variety of characteristics, the Court consistently describes a general "fundamental right to marry" rather than "the right to interracial marriage," "the right to inmate marriage," or "the right of people owing child support to marry." *See Golinski v. U .S. Office of Pers. Mgmt.*, 824 F.Supp.2d 968, 982 n. 5 (N.D.Cal.2012) (citing *Loving*, 388 U.S. at 12; *Turner*, 482 U.S. at 94–96; *Zablocki v. Redhail*, 434 U.S. 374, 383–86, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978); *accord In re Marriage Cases*, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 421 n. 33 (Cal.2008) (*Turner* "did not characterize the constitutional right at issue as 'the right to inmate marriage' ").

***8** In *Lawrence v. Texas*, 549 U.S. 558 (2003), the Supreme Court held that the right of consenting adults (including same-sex couples) to engage in private, sexual intimacy is protected by the Fourteenth Amendment's protection of liberty, notwithstanding the historical existence of sodomy laws and their use against gay people. For the same reasons, the fundamental right to marry is "deeply rooted in this Nation's history and tradition" for purposes of constitutional protection even though same-sex couples have not historically been allowed to exercise that right. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Id.* at 572 (citation omitted). While courts use history and tradition to identify the interests that due process protects, they do not carry forward historical limitations, either traditional or arising by operation of prior law, on which Americans may exercise a right, once that right is recognized as one that due process protects.

[5] "Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 76 Cal.Rptr.3d 683, 183 P.3d at 430 (quotation omitted). For example, when the Supreme Court held that anti-miscegenation laws violated the fundamental right to marry in *Loving*, it did so despite a long tradition of excluding interracial couples from marriage. *Planned Parenthood v. Casey*, 505 U.S. 833, 847–48, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* ..."); *Lawrence*, 539 U.S. at 577–78 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack") (citation omitted). Indeed, the fact that a form of discrimination has been "traditional" is a reason to be more skeptical of its rationality and cause for courts to be especially vigilant.

Cases subsequent to *Loving* have similarly confirmed that ***the fundamental right to marry is available even to those who have not traditionally been eligible to exercise that right.*** *See Boddie v. Connecticut*, 401 U.S. 371, 376, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (states may not require indigent individuals to pay court fees in order to obtain a divorce, since doing so unduly burdened their fundamental right to marry again); *see also Zablocki*, 434 U.S. at 388–90 (state may not condition ability to marry on fulfillment of existing child support obligations). Similarly, the right to marry as traditionally understood in this country did not extend to people in prison. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L.Rev. 275, 277–79 (1985). Nevertheless, in *Turner*, 482 U.S. at 95–97, the Supreme Court held that a state cannot restrict a prisoner's ability to marry without sufficient justification. When analyzing other fundamental rights and liberty inter-

ests in other contexts, the Supreme Court has consistently adhered to the principle that ***a fundamental right,*** once recognized, properly ***belongs to everyone.*** FN12

***9** Consequently, based on the foregoing, the right to marriage is a fundamental right that is denied to same-sex couples in Ohio by the marriage recognition bans.

2. Right of Marriage Recognition

Defendants also violate the married Plaintiffs' right to remain married by enforcing the marriage bans, which right this Court has already identified as "a fundamental liberty interest appropriately protected by the Due Process Clause of the United States Constitution." *Obergefell*, 962 F.Supp.2d at 978. "When a state effectively terminates the marriage of a same-sex couple married in another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court." *Id.* at 979; *see also Windsor*, 133 S.Ct. at 2694 (When one jurisdiction refuses recognition of family relationships legally established in another, "the differentiation demeans the couple, whose moral and sexual choices the Constitution protects ... and whose relationship the State has sought to dignify"). ***As the Supreme Court has held: this differential treatment "humiliates tens of thousands of children now being raised by same-sex couples,"*** which group includes Adopted Child Doe and the children who will be born to the Henry/Rogers, Yorksmith, and Noe/McCracken families. *Windsor*, 133 S.Ct. at 2694.

3. Right to Parental Authority

Finally, the marriage recognition bans also implicate the parenting rights of samesex married couples with children. The Constitution accords parents significant rights in the care and control of their children. *See Parham v. J.R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979). Parents enjoy unique rights to make crucial decisions for their children, including decisions about schooling, religion, medical care, and with whom the child may have contact. *See, e.g., id.* (medical decisions); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (education and religion); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (education); *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (visitation with relatives). U.S. Supreme Court rulings, reflected in state laws, make clear that these parental rights are fundamental and may be curtailed only under exceptional circumstances. *See Troxel*, 530 U.S. at 66; *Stanley v. Illinois*, 405 U.S. 645, 651–52, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *see also, e.g., In re D.A .*, 113 Ohio St.3d 88, 862 N.E.2d 829, 832 (Ohio 2007) (citing Ohio cases on parents' "paramount" right to custody of their children).

4. Level of Scrutiny

As a general matter, the Supreme Court applies strict scrutiny when a state law encroaches on a fundamental right, and thus such scrutiny is appropriate in the context of the right to marry and the right to parental authority. *See, e.g., Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

[6] The right to marriage recognition has not been expressly recognized as "fundamental," however, and in the previously referenced set of cases establishing the highly-protected status of existing marriage, family, and intimate relationships, the Supreme Court has often applied an intermediate standard of review falling in between rational basis and strict scrutiny. *See, e.g., Moore*, 431 U.S. at 113 (1977) (balancing the state interests advanced and the extent to which they are served by the challenged law against the burden on plaintiff's rights); *Zablocki*, 434 U.S. at 374 (same). As this Court held in *Obergefell*, "the balancing approach of intermediate scrutiny is appropriate in this similar instance where Ohio is intruding into—and in fact erasing—Plaintiffs' already-established marital and family relations." 962 F.Supp.2d at 979.

--- F.Supp.2d ----, 2014 WL 1418395 (S.D.Ohio)
(Cite as: 2014 WL 1418395 (S.D.Ohio))

5. Burden on Plaintiffs

***10** When couples—including same-sex couples—enter into marriage, it generally involves long-term plans for how they will organize their finances, property, and family lives. "In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere." *In re Estate of Lenherr*, 455 Pa. 225, 314 A.2d 255, 258 (Pa.1974). Married couples moving from state to state have an expectation that their marriage and, more concretely, the property interests involved with it—including bank accounts, inheritance rights, property, and other rights and benefits associated with marriage—will follow them.

When a state effectively terminates the marriage of a same-sex couple married in another jurisdiction by refusing to recognize the marriage, that state unlawfully intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court. After *Lawrence*, same-sex relationships fall squarely within this sphere, and when it comes to same-sex couples, a state may not "seek to control a personal relationship," "define the meaning of the relationship," or "set its boundaries absent injury to a person or abuse of an institution the law protects." *Lawrence*, 539 U.S at 578.

For example, when a parent's legal relationship to his or her child is terminated by the state, it must present clear and convincing evidence supporting its action to overcome the burden of its loss, *Santosky v. Kramer*, 455 U.S. 745, 753, 769, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); and, here, a similar legal familial relationship is terminated by Ohio's marriage recognition ban. Moreover, the official statutory and constitutional establishment of same-sex couples married in other jurisdictions as a disfavored and disadvantaged subset of relationships has a destabilizing and stigmatizing impact on those relationships. In striking down the statutory provision that had denied gay and lesbian couples federal recognition of their otherwise valid marriages in *Windsor*, the Supreme Court observed:

> [The relevant statute] tells those couples, and all the world, that their otherwise valid marriages are unworthy of ... recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. ***The differentiation demeans the couple, whose moral and sexual choices the Constitution protects ... And it humiliates tens of thousands of children now being raised by same-sex couples.*** The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

133 S.Ct. at 2694 (emphasis supplied).

In the family law context, while opposite-sex married couples can invoke step-parent adoption procedures or adopt children together, same-sex married couples cannot. Ohio courts allow an individual gay or lesbian person to adopt a child, but not a same-sex couple. *Obergefell*, 962 F.Supp.2d at 980. Same-sex couples are denied local and state tax benefits available to heterosexual married couples, denied access to entitlement programs (Medicaid, food stamps, welfare benefits, *etc.*) available to heterosexual married couples and their families, barred by hospital staff and/or relatives from their long-time partners' bedsides during serious and final illnesses due to lack of legallyrecognized relationship status, denied the remedy of loss of consortium when a spouse is seriously injured through the acts of another, denied the remedy of a wrongful death claim when a spouse is fatally injured through the wrongful acts of another, and evicted from their homes following a spouse's death because same-sex spouses are considered complete strangers to each other in the eyes of the law. *Id.*

--- F.Supp.2d ----, 2014 WL 1418395 (S.D.Ohio)
(Cite as: 2014 WL 1418395 (S.D.Ohio))

11** ***Identification on the child's birth certificate is the basic currency by which parents can freely exercise these protected parental rights and responsibilities. It is also the only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity, parentage, and citizenship, and it is required in an array of legal contexts. ***Obtaining a birth certificate that accurately identifies both parents of a child born using anonymous donor insemination or adopted by those parents is vitally important for multiple purposes.*** The birth certificate can be critical to registering the child in school; [FN13] determining the parents' (and child's) right to make medical decisions at critical moments; obtaining a social security card for the child; [FN14] obtaining social security survivor benefits for the child in the event of a parent's death; establishing a legal parent-child relationship for inheritance purposes in the event of a parent's death; [FN15] claiming the child as a dependent on the parent's insurance plan; claiming the child as a dependent for purposes of federal income taxes; and obtaining a passport for the child and traveling internationally.[FN16] ***The inability to obtain an accurate birth certificate saddles the child with the life-long disability of a government identity document that does not reflect the child's parentage and burdens the ability of the child's parents to exercise their parental rights and responsibilities.***

The benefits of state-sanctioned marriage are extensive, and the injuries raised by Plaintiffs represent just a portion of the harm suffered by same-sex married couples due to Ohio's refusal to recognize and give legal effect to their lawful unions.

6. Potential State Interests

[7] Defendants advance a number of interests in support of Ohio's marriage recognition ban. (Doc. 20 at 32–36). Defendants cite "the decision to preserve uniformly the traditional definition of marriage without regard to contrary determinations by some other jurisdictions," "avoiding judicial intrusion upon a historically legislative function," "assur[ing] that it is the will of the people of Ohio ... that controls," "approaching social change with deliberation and due care," and "[p]reserving the traditional definition of marriage," although they raise these interests in the context of a rational basis equal protection analysis. (*Id.*) Although strict scrutiny is implicated by more than one fundamental right threatened by the marriage recognition ban, even in the intermediate scrutiny context, these vague, speculative, and/or unsubstantiated state interests rise nowhere near the level necessary to counterbalance the specific, quantifiable, particularized injuries detailed above suffered by same-sex couples when their existing legal marriages and the attendant protections and benefits are denied to them by the state. In particular, the Court notes that ***given that all practicing attorneys, as well as the vast majority of all citizens in this country, are fully aware that unconstitutional laws cannot stand, even when passed by popular vote, Defendants' repeated appeal to the purportedly sacred nature of the will of Ohio voters is particularly specious.***

***12** [8] The stated interest in "preserving the traditional definition of marriage" is not a legitimate justification for Ohio's arbitrary discrimination against gays based solely on their sexual orientation. As federal judge John G. Heyburn II eloquently explained in invalidating Kentucky's similar marriage recognition ban:

> Many Kentuckians believe in "traditional marriage." Many believe what their ministers and scriptures tell them: that a marriage is a sacrament instituted between God and a man and a woman for society's benefit. They may be confused—even angry—when a decision such as this one seems to call into question that view. These concerns are understandable and deserve an answer.
>
> Our religious beliefs and societal traditions are vital to the fabric of society. Though each faith, minister, and individual can define marriage for themselves,

> at issue here are laws that act outside that protected sphere. Once the government defines marriage and attaches benefits to that definition, it must do so constitutionally. It cannot impose a traditional or faith-based limitation upon a public right without a sufficient justification for it. Assigning a religious or traditional rationale for a law, does not make it constitutional when that law discriminates against a class of people without other reasons.
>
> ***The beauty of our Constitution is that is accommodates our individual faith's definition of marriage while preventing the government from unlawfully treating us differently. This is hardly surprising since it was written by people who came to America to find both freedom of religion and freedom from it.***

Bourke v. Beshear, 2014 WL 556729, at 10 (W.D.Ky. Feb.12, 2014) (emphasis supplied) (declaring Kentucky's anti-recognition provisions unconstitutional on equal protection grounds).

[9] Defendants argue that *Windsor* stressed that "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." 133 S.Ct. at 2692. However, as this Court emphasized in *Obergefell*, this ***state regulation of marriage is "subject to constitutional guarantees"*** and "the fact that each state has the exclusive power to create marriages within its territory does not logically lead to the conclusion that states can nullify already-established marriages absent due process of law." 962 F.Supp.2d at 981.

Quintessentially, as the Supreme Court has held, marriage confers "a dignity and status of immense import." *Windsor*, 133 U.S. at 2692. When a state uses "its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhance[s] the recognition, dignity, and protection of the class in their own community." *Id.* Here, based on the record, Defendants have again failed to provide evidence of any state interest compelling enough to counteract the harm Plaintiffs suffer when they lose this immensely important dignity, status, recognition, and protection, as such a state interest does not exist.

***13** Accordingly, Ohio's refusal to recognize same-sex marriages performed in other jurisdictions violates the substantive due process rights of the parties to those marriages because it deprives them of their rights to marry, to remain married, and to effectively parent their children, absent a sufficient articulated state interest for doing so.

C. Equal Protection Clause

This Court's analysis in *Obergefell* also compels the conclusion that Defendants violate Plaintiffs' right to equal protection by denying recognition to their marriages and the protections for families attendant to marriage. In *Obergefell*, this Court noted Ohio's long history of respecting out-of-state marriages if valid in the place of celebration, with only the marriages of same-sex couples singled out for differential treatment. 962 F.Supp.2d at 983–84.

Under Ohio law, if the Henry/Rogers, Yorksmith, and Noe/McCracken couples' marriages were accorded respect, both spouses in the couple would be entitled to recognition as the parents of their expected children. As a matter of statute, Ohio respects the parental status of the non-biologically related parent whose spouse uses AI to conceive a child born to the married couple. *See* Ohio Rev.Code § 3111.95 (providing that if "a married woman" uses "non-spousal artificial insemination" to which her spouse consented, the spouse "shall be treated in law and regarded as" the parent of the child, and the sperm donor shall have no parental rights); *see also* Ohio Rev.Code § 3111.03 (providing that a child born to a married couple is presumed the child of the birth mother's spouse).

An Ohio birth certificate is a legal document, not a medical record. Birth certificates for newborn babies are generated by Defendants through use of the Integrated Perinatal Health Information System ("IPHIS") with information collected at birth facilities.[FN17] Informants are advised that "[t]he birth certificate is a document that will be used for important purposes including proving your child's age, citizenship and parentage. The birth certificate will be used by your child throughout his/her life." [FN18] ***The Ohio Department of Health routinely issues birth certificates naming as parents both spouses to opposite-sex married couples who use AI to conceive their children.***[FN19] However, Defendants refuse to recognize these Plaintiffs' marriages and the parental presumptions that flow from them, and will refuse to issue birth certificates identifying both women in these couples as parents of their expected children. (Doc. 15 at ¶¶ 59–62).

Similarly, when an Ohio-born child is adopted by the decree of a court of another state, the Ohio Department of Health "shall issue ... a new birth record using the child's adoptive name and the names of and data concerning the adoptive parents." Ohio Rev.Code § 3705.12(A)(1). However, the Department of Health refuses to comply with this requirement based on Ohio Rev.Code § 3107.18(A), which provides that "[e]xcept when giving effect to such a decree would violate the public policy of this state, a court decree ... establishing the relationship by adoption, issued pursuant to due process of law by a court of any jurisdiction outside this state ... shall be recognized in this state."

14** Before Governor Kasich's administration and prior-Defendant Wymyslo's leadership of the Department of Health, Ohio recognized out-of-state adoption decrees of same-sex couples and supplied amended birth certificates identifying the adoptive parents. (*See* Docs. 4–6, 4–7, and 4–8). However, the current administration takes the position that issuing birth certificates under such circumstances would violate "public policy," *i.e.*, Ohio's purported limitation on adoptions within the State to couples only if those couples are married. O.R.C. § 3107.03(A). ***If the Vitale/Talmas spouses were an opposite-sex couple, Defendant Himes would recognize their marriage, their New York adoption decree, and their right to an accurate birth certificate for Adopted Child Doe.

1. Heightened Scrutiny

As the Court discussed in *Obergefell*, the Sixth Circuit has not reviewed controlling law regarding the appropriate level of scrutiny for reviewing classifications based on sexual orientation, such as Ohio's marriage recognition ban, since *Windsor*. 962 F.Supp.2d at 986. The most recent Sixth Circuit case to consider the issue, *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir.2012), rejected heightened scrutiny by relying on *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir.2006), which in turn relied on *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir.1997). As the Court concluded in *Obergefell*, however, *Equality Foundation* now rests on shaky ground and there are "ample reasons to revisit the question of whether sexual orientation is a suspect classification," including the fact that Sixth Circuit precedent on this issue—*Equality Foundation* among it—is based on *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), which was overruled by *Lawrence*, 549 U.S. at 558. *Bassett v. Snyder*, No. 12–10038, 2013 WL 3285111, at *1 (E.D.Mich. June 28, 2013) (same-sex couples demonstrated a likelihood of success on the merits of their equal protection claim regarding a Michigan law prohibiting same-sex partners from receiving public employer benefits).[FN20] The Supreme Court, in overruling *Bowers*, emphatically declared that it "was not correct when it was decided and is not correct today." *Lawrence*, 539 U.S. at 578.

[10] As a result, this Court held in *Obergefell* that lower courts without controlling post-*Lawrence*

precedent on the issue should now apply the criteria mandated by the Supreme Court to determine whether sexual orientation classifications should receive heightened scrutiny. 962 F.Supp.2d at 987. The Court then analyzed the four factors that, to varying degrees, may be considered to determine whether classifications qualify as suspect or quasi-suspect: whether the class (1) has faced historical discrimination, (2) has a defining characteristic that bears no relation to ability to contribute to society, (3) has immutable characteristics, and (4) is politically powerless. *Id.* at 987–91. The Court concluded that "[s]exual orientation discrimination accordingly fulfills all the criteria the Supreme Court has identified, thus Defendants must justify Ohio's failure to recognize same-sex marriages in accordance with a heightened scrutiny analysis," and finally that Defendants "utterly failed to do so." *Id.* at 991. Subsequent to *Obergefell*, the Ninth Circuit similarly held that *Windsor* "requires heightened scrutiny" for classifications based on sexual orientation. *Smithkline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 484 (9th Cir.2014) ("we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection ... Thus, there can no longer be any question that gays and lesbians are no longer a 'group or class of individuals normally subject to 'rational basis' review.' ") (citation omitted). The Court's entire *Obergefell* analysis applies and controls here, and classifications based on sexual orientation must pass muster under heightened scrutiny to survive constitutional challenge.

15** [11] ***Here, Defendants' discriminatory conduct most directly affects the children of same-sex couples, subjecting these children to harms spared the children of opposite-sex married parents. Ohio refuses to give legal recognition to both parents of these children, based on the State's disapproval of their same-sex relationships. Defendants withhold accurate birth certificates from these children, burdening the children because their parents are not the opposite-sex married couples who receive the State's special stamp of approval. ***The Supreme Court has long held that disparate treatment of children based on disapproval of their parents' status or conduct violates the Equal Protection Clause.*** *See, e.g., Plyler v. Doe*, 457 U.S. 202, 220, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (striking down statute prohibiting undocumented immigrant children from attending public schools because it "imposes its discriminatory burden on the basis of a legal characteristic over which the children can have little control").[FN21] Such discrimination also triggers heightened scrutiny. *See, e.g., Pickett v. Brown*, 462 U.S. 1, 8, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983).

The children in Plaintiffs' and other same-sex married couples' families cannot be denied the right to two legal parents, reflected on their birth certificates and given legal respect, without a sufficient justification. No such justification exists.

2. Rational Basis

As the Court further held in *Obergefell*, even if no heightened level of scrutiny is applied to Ohio's marriage recognition bans, they still fail to pass constitutional muster. 962 F.Supp.2d at 991. The Court noted that "[e]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained," that "some objectives ... are not legitimate state interests," and, even when a law is justified by an ostensibly legitimate purpose, that "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Romer*, 517 U.S. at 632; *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

At the most basic level, by requiring that classifications be justified by an independent and legitimate purpose, the Equal Protection Clause prohibits classifications from being drawn for "the purpose of disadvantaging the group burdened by the law."

Romer, 517 U.S. at 633 (emphasis supplied); *see also Windsor*, 133 S.Ct. at 2693; *City of Cleburne, Tex.*, 473 U.S. at 450; *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). This Court concluded by noting that in *Bassett*, 2013 WL 3285111 at 24–26, the court held that same-sex couples demonstrated a likelihood of success on the merits of their equal protection claim regarding a Michigan law prohibiting same-sex partners from receiving public employee benefits where "[t]he historical background and legislative history of the Act demonstrate that it was motivated by animus against gay men and lesbians." The Court further determined that a review of the historical background and legislative history of the laws at issue and the evidentiary record established conclusively that the requested relief must also be granted to Plaintiffs on the basis of the Equal Protection Clause. *Obergefell*, 962 F.Supp.2d at 993.

***16** Again, the Court's prior analysis controls, and Ohio's marriage recognition bans also fail rational basis review.

3. Potential State Interests

This Court has already considered and rejected as illegitimate and irrational any purported State interests justifying the marriage recognition bans. *Obergefell*, 962 F.Supp.2d at 993–95. Based on this controlling analysis, the government certainly cannot meet its burden under heightened scrutiny to demonstrate that the marriage recognition ban is necessary to further important State interests. All advanced State interests are as inadequate now as they were several months ago to justify the discrimination caused by the marriage recognition ban and the ban's particularly harmful impact on Ohio-born children.

Of particular relevance to this case, in *Obergefell* this Court analyzed and roundly rejected any claimed government justifications based on a preference for procreation or childrearing by heterosexual couples. 962 F.Supp.2d at 994. This Court further concluded that ***the overwhelming scientific consensus, based on decades of peerreviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples.*** *Id.* at n. 20. In fact, the U.S. Supreme Court in *Windsor* (and more recently, numerous lower courts around the nation) similarly rejected a purported government interest in establishing a preference for or encouraging parenting by heterosexual couples as a justification for denying marital rights to same-sex couples and their families. The Supreme Court was offered the same false conjectures about child welfare this Court rejected in *Obergefell*, and the Supreme Court found those arguments so insubstantial that it did not deign to acknowledge them. Instead, the Supreme Court concluded:

> DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for ***no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.*** By seeking to displace this protection and treating those persons as living in marriages less respected than others [the federal government's non-recognition of marriages is unconstitutional].

Windsor, 133 S.Ct. at 2696 (emphasis supplied). All of the federal trial court court decisions since *Windsor* have included similar conclusions on this issue, including that child welfare concerns weigh exclusively in favor of recognizing the marital rights of same-sex couples.[FN22]

In sum, under Supreme Court jurisprudence, and as confirmed in numerous recent trial court decisions, states do not have any governmental interest sufficient to justify their refusal to recognize lawful out-of-state marriages between same-sex couples.[FN23]

D. Full Faith and Credit

17** Because this Court has found that Ohio's marriage recognition bans are constitutionally invalid on their face and unenforceable, Defendants no longer have a basis on which to argue that recognizing same-sex marriages on out-of-state adoption decrees violates Ohio public policy, and thus it is unnecessary to reach Plaintiffs' arguments based on the Full Faith and Credit Clause. However, the Court determines that, as expressed *infra* in endnote i, Plaintiffs have also demonstrated a compelling basis on which to find, and the Court does so find, that ***Plaintiffs Vitale and Talmas have a right to full faith and credit for their New York adoption decree here in Ohio.[FN24]

E. Irreparable Harm

[12] Finally, Plaintiffs have easily met their burden to demonstrate they are suffering irreparable harm from Defendants' violation of their rights to due process, equal protection, and full faith and credit for their adoption decrees. Birth certificates are vitally important documents. As outlined above, Ohio's refusal to recognize Plaintiffs' and other same-sex couples' valid marriages imposes numerous indignities, legal disabilities, and psychological harms. Further, the State violates Plaintiffs' and other same-sex couples' fundamental constitutional rights to marry, to remain married, and to function as a family.

"Constitutional violations are routinely recognized as causing irreparable harm unless they are promptly remedied." *Obergefell*, 962 F.Supp.2d at 996; *see also Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Saenz v. Roe*, 526 U.S. 489, 498, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) (violation of the right to travel interstate constitutes irreparable injury). Without a permanent injunction and declaratory relief, the affected same-sex couples and their children would have to continue to navigate life without the birth certificates that pave the way through numerous transactions, large and small. They would needlessly suffer harmful delays, bureaucratic complications, increased costs, embarrassment, invasions of privacy, and disrespect. Same-sex couples' legal status as parents will be open to question, including in moments of crisis when time and energy cannot be spared to overcome the extra hurdles Ohio's discrimination erects. [FN25] The marital status of the couples will likewise be open to question, depriving these families of the far-reaching security, protections, and dignity that come with recognition of their marriages.

Plaintiffs and other affected same-sex couples require injunctive and declaratory relief to lift the stigma imposed by Defendants' disrespect for their spousal and parental statuses. Imposition of these burdens on same-sex couples serves no legitimate public interest that could counteract the severe and irreparable harm imposed by the marriage recognition bans.

Plaintiffs have therefore more than adequately demonstrated their entitlement to declaratory and injunctive relief.[FN26]

IV. CONCLUSION

***18** Accordingly, based on the foregoing, Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction (Doc. 18) is hereby **GRANTED.** Specifically:

1. The Court finds that those portions of Ohio Const. Art. XV, § 11, Ohio Rev.Code § 3101.01(C), and any other provisions of the Ohio Revised Code that may be relied on to deny legal recognition to the marriages of same-sex couples validly entered in other jurisdictions, violate rights secured by the Fourteenth Amendment to the United States Constitution in that same-sex couples married in jurisdictions where same-sex marriage is lawful, who seek to have their out-of-state marriages recognized

and accepted as legal in Ohio and the enjoy the rights, protections, and benefits of marriage provided to heterosexual married couples under Ohio law, are denied significant liberty interests and fundamental rights without due process of law and in violation of their right to equal protection.

2. Defendants and their officers and agents are permanently enjoined from (a) enforcing the marriage recognition ban, (b) denying same-sex couples validly married in other jurisdictions all the rights, protections, and benefits of marriage provided under Ohio law, and (c) denying full faith and credit to decrees of adoption duly obtained by same-sex couples in other jurisdictions. The Court will separately issue an Order of Permanent Injunction to this effect.

3. Defendants shall issue birth certificates to Plaintiffs for their children listing *both* same-sex *parents.*

IT IS SO ORDERED.[FN27]

FN1. The Court's Order today does NOT require Ohio to authorize the performance of same-sex marriage in Ohio. Today's ruling merely requires Ohio to *recognize* valid same-sex marriages lawfully performed in states which do authorize such marriages.

FN2. *See, e.g., Kitchen v. Herbert,* 2013 WL 6697874, at *30 (D.Utah Dec.20, 2013) (permanently enjoining **Utah** anti-celebration provisions on due process and equal protection grounds); *Obergefell,* 962 F.Supp.2d at 997–98 (permanently enjoining as to plaintiffs enforcement of **Ohio** anti-recognition provisions on due process and equal protection grounds); *Bishop v. United States ex rel. Holder,* 2014 WL 116013, at *33–34 (N.D.Okla. Jan.14, 2014) (permanently enjoining **Oklahoma**'s anti-celebration provisions on equal protection grounds); *Bourke v. Beshear,* 2014 WL 556729, at *1 (W.D.Ky. Feb.12, 2014) (declaring **Kentucky**'s antirecognition provisions unconstitutional on equal protection grounds); *Bostic v. Rainey,* 2014 WL 561978, at *23 (E.D.Va. Feb.13, 2014) (finding **Virginia**'s anti-celebration and anti-recognition laws unconstitutional on due process and equal protection grounds, and preliminarily enjoining enforcement); *Lee v. Orr,* 2014 WL 683680 (N.D.Ill. Feb.21, 2014) (declaring **Illinois** celebration ban unconstitutional on equal protection grounds); *De Leon v. Perry,* 2014 WL 715741, at *1, 24 (W.D.Tex. Feb.26, 2014) (preliminarily enjoining **Texas** anti-celebration and anti-recognition provisions on equal protection and due process grounds); *Tanco v. Haslam,* 2014 WL 997525, at *6, 9 (M.D.Tenn. Mar.14, 2014) (enjoining enforcement of **Tennessee** anti-recognition provisions on equal protection grounds); *DeBoer v. Snyder,* 2014 WL 1100794, at *17 (E.D.Mich. Mar.21, 2014) (permanently enjoining **Michigan** anti-celebration provisions on equal protection grounds); *Baskin v. Bogan* (S.D. Ind. April 10, 2014 (J. Young) (temporarily enjoining **Indiana**'s marriage recognition ban).

FN3. *See Obergefell,* 962 F.Supp.2d at 974–75.

FN4. *See* Doc. 4–2.

FN5. *See* Doc. 4–3.

FN6. *See* Doc. 4–4.

FN7. *See* Doc. 4–5.

FN8. *See* Doc. 4–6.

FN9. The concept of the right to remain married as a liberty interest protected by the Due Process Clause is advanced by Professor Steve Sanders in his article *The Constitutional Right to (Keep Your) Same–Sex Marriage*, 110 MICH. L.REV. 1421 (2011).

FN10. *See also Turner v. Safley*, 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) ("The decision to marry is a fundamental right"); *Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"); *Griswold v. Connecticut*, 381 U.S. 479, 485–486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (intrusions into the "sacred precincts of marital bedrooms" offend rights "older than the Bill of Rights"); *id.* at 495–496 (Goldberg, J., concurring) (the law in question "disrupt[ed] the traditional relation of the family—a relation as old and as fundamental as our entire civilization"); *see generally Washington v. Glucksberg*, 521 U.S. 702, 727 n. 19, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (citing cases).

FN11. *See also Wilson v. Ake*, 354 F.Supp.2d 1298, 1306–07 (M.D.Fla.2005) ("No federal court has recognized that [due process] ... includes the right to marry a person of the same sex") (internal citation omitted); *Conaway v. Deane*, 401 Md. 219, 932 A.2d 571, 628 (Md.App.2007) ("[V]irtually every court to have considered the issue has held that same-sex marriage is not constitutionally protected as fundamental in either their state or the Nation as a whole"); *Hernandez v. Robles*, 885 N.E.2d 1, 9 (N.Y.2006) ("The right to marry is unquestionably a fundamental right ... The right to marry someone of the same sex, however, is not "deeply rooted," it has not even been asserted until relatively recent times").

FN12. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 315–16, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (an individual involuntarily committed to a custodial facility because of a disability retained liberty interests including a right to freedom from bodily restraint, thus departing from a longstanding historical tradition in which people with serious disabilities were not viewed as enjoying such substantive due process rights and were routinely subjected to bodily restraints in institutions); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (striking down a ban on distributing contraceptives to unmarried persons, building on a holding in *Griswold*, 381 U.S. at 486, that states could not prohibit the use of contraceptives by married persons); *Lawrence*, 539 U.S. at 566–67 (lesbian and gay Americans could not be excluded from the existing fundamental right to sexual intimacy, even though historically they had often been prohibited from full enjoyment of that right).

FN13. *See* Ohio Rev.Code Ann. § 3313.672(A)(1) (birth certificate generally must be presented at time of initial entry into public or nonpublic school

FN14. *See* Social Security Administration, Social Security Numbers for Children, http://www.ssa.gov/pubs/EN–05–0023.pdf #nameddest=adoptiveparents (last visited Feb. 26, 2014).

FN15. *See Sefcik v. Mouyos*, 171 Ohio

App.3d 14, 869 N.E.2d 105, 108 (Ohio App.2007) (noting that a child's birth certificate is *prima facie* evidence of parentage for inheritance purposes).

FN16. *See Minors under Age 16*, U.S. Dept. of State, U.S. Passports & Int'l Travel, http://travel.state.gov/passport/get/minors/minors_834.html (last visited Feb. 26 2014); *New U.S. Birth Certificate Requirement*, U.S. Dept of State, U.S. Passports & Int'l Travel, http://travel.state.gov/passport/passport_5401.html (last visited Feb. 26, 2014) (certified birth certificates listing full names of applicant's parents must be submitted with passport application as evidence of citizenship).

FN17. A suggested worksheet is provided to the hospital or other birth facility by the Ohio Department of Health for use by the birth mother or other informant. A copy of the worksheet can be found at Ohio Department of Health, http://vitalsupport.odh.ohio.gov/gd/gd.aspx?Page=3 & TopicRelationID=5 & Content=5994 (last visited Feb. 28, 2014). The hospital or birth facility then enters the information gathered into the IPHIS. Two flow sheets describing the typical sequence of steps leading to a birth certificate can be found at *Birth Facility Easy–Step Guide For IPHIS*, pages 4–5, Ohio Department of Health, http://vitalsupport.odh.ohio.gov/gd/gd.aspx?Page=3 & TopicRelationID=519 & Content=4597 (last visited Feb. 28, 2014).

FN18. *Mother's Worksheet for Child's Birth*, available at Ohio Department of Health, http://vitalsupport.odh.ohio.gov/gd/gd.aspx? Page=3 & TopicRelationID=5 & Content=5994 (last visited February 28, 2014).

FN19. *See* Ohio Rev.Code § 3111.03(A)(1) ("[a] man is presumed to be the natural father of a child," including when "[t]he man and the child's mother are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated by death, annulment, divorce, or dissolution or after the man and the child's mother separate pursuant to a separation agreement"); *see also* Ohio Rev.Code § 3111.95(A) ("If a married woman is the subject of a non-spousal artificial insemination and if her husband consented to the artificial insemination, the husband shall be treated in law and regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall be treated in law and regarded as the natural child of the husband."); Ohio Rev.Code § 3705.08(B) ("All birth certificates shall include a statement setting forth the names of the child's parents ...").

FN20. *See also Pedersen v. Office of Pers. Mgmt.*, 881 F.Supp.2d 294, 312 (D.Conn.2012) ("The Supreme Court's holding in Lawrence 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi-suspect class' ') (citations omitted); *Golinski*, 824 F.Supp.2d at 984 ("[T]he reasoning in [prior circuit court decisions], that laws discriminating against gay men and lesbians are not entitled to heightened scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*").

FN21. *See also Mathews v. Lucas*, 427 U.S. 495, 505, 96 S.Ct. 2755, 49 L.Ed.2d 651

(1976) ("visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons 'is illogical and unjust' "); *Weber v. Aetna Ca. Sur. Co.*, 406 U.S. 164, 175, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972) ("imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing"); *Walton v. Hammons*, 192 F.3d 590, 599 (6th Cir.1999) (holding state could not withhold children's food stamp support based on their parents' non-cooperation in establishing paternity of their children).

FN22. *See, e.g.*, *De Leon*, 2014 WL 715741 (declaring unconstitutional Texas bans on same-sex marriage and out-of-state marriage recognition, and rejecting as irrational purported childrearing and procreation justifications); *Bostic*, 2014 WL 561978 at 18 (declaring unconstitutional Virginia's marriage ban, which has the effect of "needlessly stigmatizing and humiliating children who are being raised" by same-sex couples and "betrays" rather than serves an interest in child welfare); *Bourke*, 2014 WL 556729 at 8 (rejecting purported government interest in withholding marriage recognition to advance procreation and childrearing goals, and holding Kentucky's marriage recognition ban, similar to Ohio's, unconstitutional); *Bishop*, 2014 WL 116013 at 28–33 (rejecting purported government interests in responsible procreation and childrearing as justifications for Oklahoma's same-sex marriage ban, which was held unconstitutional); *Kitchen*, 2013 WL 6697874 at 25–27 (declaring Utah's marriage ban unconstitutional and finding that same-sex couples' "children are also worthy of the State's protection, yet" the marriage ban "harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples"); *Griego v. Oliver*, No. 34–306, 2013 WL 6670704, at 3 (D.N.M. Dec. 19, 2013) (rejecting "responsible procreation and childrearing" rationales to justify New Mexico's marriage ban, and declaring ban in violation of state constitution).

FN23. Again, the Court's Order today does NOT require Ohio to authorize the performance of same-sex marriage in Ohio. Today's ruling merely requires Ohio to *recognize* valid same-sex marriages lawfully performed in states which authorize such marriages.

FN24. Article IV, § 1 of the U.S. Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." In incorporating this clause into our Constitution, the Framers "foresaw that there would be a perpetual change and interchange of citizens between the several states." *McElmoyle, for Use of Bailey v. Cohen*, 38 U.S. 312, 315, 13 Pet. 312, 10 L.Ed. 177 (1839). The Supreme Court has explained that the "animating purpose" of the full faith and credit command is:

> to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Baker v. Gen. Motors Corp., 522 U.S.

222, 232, 118 S.Ct. 657, 139 L.Ed.2d 580 (1988) (quoting *Milwaukee Cnty. v. M.E., White Co.*, 296 U.S. 268, 277, 56 S.Ct. 229, 80 L.Ed. 220 (1935)).

In the context of judgments, the full faith and credit obligation is exacting, giving nationwide force to a final judgment rendered in a state by a court of competent jurisdiction. *Baker*, 522 U.S. at 233. Proper full faith and credit analysis distinguishes between public acts, which may be subject to public policy exceptions to full faith and credit, and judicial proceedings, which decidedly are not subject to any public policy exception to the mandate of full faith and credit *See id.* at 232 ("Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments"); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 437, 64 S.Ct. 208, 88 L.Ed. 149 (1943) ("The full faith and credit clause and the Act of Congress implementing it have, for most purposes, placed a judgment on a different footing from a statute of one state, judicial recognition of which is sought in another").

The Supreme Court has thus rejected any notion that a state may disregard the full faith and credit obligation simply because the state finds the policy behind the out-of-state judgment contrary to is own public policies. According to the Court, "our decisions support no roving 'public policy exception' to the full faith and credit due judgments." *Baker*, 522 U.S. at 233; *see also Estin v. Estin*, 334 U.S. 541, 546, 68 S.Ct. 1213, 92 L.Ed. 1561 (1948) (Full Faith and Credit Clause "ordered submission ... even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it"); *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942) (requiring North Carolina to recognize change in marital status effected by Nevada divorce decree contrary to laws of North Carolina).

Consistent with the guarantee of full faith and credit, Defendant Himes's Department of Health is mandated under a provision of the Vital Statistics section of the Ohio Code to issue an amended birth certificate upon receipt of an adoption decree issued by the court of another state. Pursuant to Ohio Revised Code § 3705.12(A) and (B), upon receipt of a decree of adoption of an Ohio-born child, issued with due process by the court of another state, "the department of health shall issue, unless otherwise requested by the adoptive parents, a new birth record using the child's adopted name and the names of and data concerning the adoptive parents...." This statute does not leave discretion in Defendant Himes's hands to reject duly issued out-of-state adoption decrees based on whether the adoption could have been obtained under Ohio law.

Indeed, as already discussed, before the tenure of prior-Defendant Wymyslo, Ohio issued amended birth certificates based on the out-of-state adoption decrees of same-sex parents, notwithstanding Ohio's purported policy against adoptions by unmarried couples within the State. Only recently has the Department of Health taken the position that Ohio Revised Code. § 3107.18, a separate provision of the "Adoption" section of the Code, frees it of its obligation to issue a corrected birth certificate upon receipt of another state's

duly issued judgment of adoption decreeing a same-sex couple as adoptive parents. (Doc. 4–6 at 4–5). According to Defendant Himes, that provision requires the Department of Health to refuse recognition to out-of-state adoption decrees of same-sex parents, whose marriages are disrespected under Ohio law, because "giving effect to such a decree would violate the public policy of this state." Ohio Revised Code § 3107.18.

This backward evolution in Ohio, from granting accurate birth certificates to adoptive same-sex parents and their children, to the current administration's refusal to do so, is yet another manifestation of the irrational animus motivating Defendants' discriminatory treatment of lesbian and gay families. The application of section 3107.18's "public policy" exception to the adoption decree of another state is contrary to Ohio's consistent recognition of the duly-issued adoption decrees of state courts of competent jurisdiction nationwide. *See, e.g., Matter of Bosworth,* No. 86–AP–903, 1987 WL 14234, at *2 (Ohio Ct.App. 10th Dist. July 16, 1987) (recognizing Florida adoption decree because, "if due process was followed by another state's court in issuing an adoption decree, an Ohio court is mandated to give full faith and credit to that state's decree"); *Matter of Swanson,* No. 90–CA–23, 1991 WL 76457 (Ohio Ct.App. 5th Dist. May 3, 1991) (recognizing New York adoption decree over objection of Ohio biological parents). Defendant Himes impermissibly injects a "roving 'public policy exception' to the full faith and credit due judgments," precisely what the Supreme Court has made clear the Full Faith and Credit Clause prohibits.

The duty to effectuate this command has commonly fallen on state courts in actions to enforce judgments obtained in out-of-state litigation, which is why many Supreme Court cases identify state courts as violators of the state's full faith and credit obligations. *See Adar v. Smith,* 639 F.3d 146, 171 (5th Cir.2011) (Weiner, J., dissenting) (citing *Guinness PLC v. Ward,* 955 F.2d 875, 890 (4th Cir.1992) ("[U]nder the common law, the procedure to enforce the judgment of one jurisdiction in another required the filing of a new suit in the second jurisdiction to enforce the judgment of the first")). However, this historical fact does not dictate that the command is directed only to state courts. For example, now "all but two or three of the fifty states have enacted some version of the Revised Uniform Enforcement of Foreign Judgments Act, which authorizes nonjudicial officers to register out-of-state judgments, thereby entrusting to them their states' obligations under the [Full Faith and Credit] Clause." *Adar,* 639 F.3d at 171 (Weiner, J., dissenting) (citation omitted). Ohio's vital statistics statutes likewise transfer to state executive officials the responsibility to receive and recognize out-of-state judgments of adoption and to issue amended Ohio birth certificates based on those judgments. *See* Ohio Revised Code § 3705.12(A) and (B).

The Fifth Circuit stands *alone* in holding that federal claims to enforce rights conferred by the Full Faith and Credit Clause are unavailable under § 1983 against nonjudicial state officials. *Adar,* 639 F.3d at 153. Given that § 1983 creates a remedy for those denied "rights, privileges, or immunities secured by the Constitution

and laws," 42 U.S.C. § 1983, and that the Supreme Court has repeatedly held that § 1983 is a remedial statute that must be applied expansively to assure the protection of constitutional rights (*see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 700–01, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (§ 1983 is "to be broadly construed, against all forms of official violation[s] of federally protected rights"); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989) (§ 1983's coverage is to be "broadly construed"); *Wayne v. Vill. of Sebring*, 36 F.3d 517, 528 (6th Cir.1994) (same)), other circuits have unremarkably entertained such claims. *See Rosin v. Monken*, 599 F.3d 574, 575 (7th Cir.2010) (adjudicating full faith and credit claim against state actors on the merits in § 1983 action); *United Farm Workers v. Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir.1982) (same); *Lamb Enters., Inc. v. Kiroff*, 549 F.2d 1052, 1059 (6th Cir.1977) (propriety of § 1983 claim in federal court to enforce full faith and credit obligation against state judge not questioned, but abstention deemed warranted).

The Supreme Court has employed a three-part test, articulated in *Golden State Transit Corp.*, 493 U.S. at 106, to determine whether a constitutional provision creates a right actionable under § 1983: whether the provision 1) "creates obligations binding on the governmental unit," 2) that are sufficiently concrete and specific as to be judicially enforced, and 3) were "intended to benefit the putative plaintiff." *Dennis v. Higgins*, 498 U.S. 439, 449, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991) (internal quotations and citations omitted). The Full Faith and Credit Clause explicitly creates obligations binding on the states, is concrete and judicially recognizable, and was intended to protect the rights of individuals to require respect across state lines for judgments in their favor. *See Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 278 n. 23, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980) ("[T]he purpose of [the Clause] was to preserve rights acquired or confirmed under the ... judicial proceedings of one state by requiring recognition of their validity in other states ....") (quoting *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940 (1939)); *Magnolia Petroleum Co.*, 320 U.S. at 439 (referring to the Clause as preserving judicially established "rights"); *see also Adar*, 639 F.3d at 176 (Weiner, J., dissenting) ("For all the same reasons advanced by the Dennis Court in recognizing the private federal right created by the Commerce Clause ... the [Full Faith and Credit] Clause indisputably does confer a constitutional 'right' for which § 1983 provides an appropriate remedy").

In *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir.2007), a § 1983 action, the Tenth Circuit held that Oklahoma was required to issue an amended birth certificate listing as parents both members of a California same-sex couple that had legally adopted a child born in Oklahoma, notwithstanding Oklahoma's prohibition against such adoptions within the state. *Id.* at 1141–42. Oklahoma, like Ohio, had a statute providing for issuance of amended birth certificates for children adopted in other states' courts. The Tenth Circuit ruled that the Full Faith and Credit Clause required Oklahoma "to apply its own law to enforce [those] adoption order[s] in an 'even-handed' manner." *Id.* at 1154 (citing

Baker, 522 U.S. at 235). The Tenth Circuit concluded: "We hold today that final adoption orders and decrees are judgments that are entitled to recognition by all other states under the Full Faith and Credit Clause." *Id.* at 1156. Oklahoma's "refusal to recognize final adoption orders of other states that permit adoption by same-sex couples" was therefore "unconstitutional." *Id.*

The principles and precedent outlined above provide a compelling basis to conclude that the Full Faith and Credit Clause also requires full recognition of Plaintiffs Vitale's and Talmas's New York adoption decree, and this Court so holds.

(As in *Obergefell*, this Court again acknowledges the continuing pendency of Section 2 of the discredited federal Defense of Marriage Act ("DOMA"), which was not before the Supreme Court in *Windsor*, and wherein Congress has sought to invoke its power under the Full Faith and Credit Clause to establish that "[n]o State ... shall be required to give effect to any public act, record, or judicial proceeding of any other State ... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State," 28 U.S.C. § 1738C. However, as in *Obergefell*, although Section 2 of DOMA is not specifically before the Court, the implications of today's ruling speak for themselves.)

FN25. For example, families can be barred in hospitals from their loved ones' bedsides due to a lack of legally-recognized relationship status. (*Id.* Doc. 17–3 at ¶ 23). And, although Ohio same-sex couples may obtain co-custody agreements for their children, such an agreement "does not ... create the full rights and responsibilities of a legally recognized child-parent relationship." (*Id.* at ¶ 19). Moreover, inheritance is governed in part by parentage (*Id.* at ¶¶ 21, 24, 30), and children are entitled to bring wrongful death actions (Doc. 17–7 at ¶ 37). Indeed, "[s]ame-sex married couples and their children live in an Ohio that automatically denies most state and federal rights, benefits and privileges to them." (*Id.* at ¶ 103).

FN26. However, the Court agrees with Defendants that Plaintiff Adoption S.T.A.R. lacks standing to pursue its claims. Rather than relying on its own rights, Adoption S.T.A.R. purports to bring this action "on behalf of its clients who seek to complete adoptions" involving Ohio-born children and seeks relief for any ... "same-sex couples married in [other] jurisdiction ... who become clients of Plaintiff Adoption S.T.A.R...." (Doc. 1 at 17). To establish Article III standing, a plaintiff must show that an injury is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Intern. USA*, —— U.S. ——, ——, 133 S.Ct. 1138, 1147, 185 L.Ed.2d 264 (2013) (internal quotations omitted). Adoption S.T.A.R. bears the burden of proving each element of standing "in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

"[A] party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or

interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (internal quotations omitted). If a party can demonstrate injury, however, that party may pursue the rights of others when it can establish that (1) "the party asserting the right has a 'close' relationship with the person who possesses the right" and (2) "there is a 'hindrance' to the possessor's ability to protect his own interests." *Boland v. Holder*, 682 F.3d 531, 537 (6th Cir.2012) (internal quotations omitted). The concept of third-party standing is typically disfavored. *Kowalski*, 543 U.S. at 130; *see also Singleton v. Wulff*, 428 U.S. 106, 113–14, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (outlining reasons why "[f]ederal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation").

Here, Adoption S.T.A.R. fails to satisfy its burden of establishing standing because it fails to satisfy the hindrance requirement. Adoption S.T.A.R. must demonstrate that its clients face some obstacle "in litigating their rights themselves." *Smith v. Jefferson Cnty. Bd. of Sch. Commis*, 641 F.3d 197, 209 (6th Cir.2011). In analyzing this question, the United States Supreme Court has generally looked for "daunting" barriers or "insurmountable procedural obstacles" to support a finding of hindrance. *See Miller v. Albright*, 523 U.S. 420, 449–50, 118 S.Ct. 1428, 140 L.Ed.2d 575 (1998) (O'Connor, J., concurring, Kennedy, J., joining) ("A hindrance signals that the rightholder did not simply decline to bring the claim on his own behalf, but could not in fact do so"). Adoption S.T.A.R. has not shown that same-sex couples married in other jurisdictions are hindered from litigating their own rights, and the participation of the other Plaintiffs in this lawsuit demonstrates that such parties are capable of doing so. Moreover, because birth certificates can be amended and reissued, there are no significant time restrictions on the ability of potential third parties to bring their own actions. *Under these circumstances, where the time constraints and logistical and emotional burdens that prevented injured third parties from vindicating their rights in Obergefelldo not exist, there is no basis for departing from the ordinary rule that "one may not claim standing ... to vindicate the constitutional rights of some third party."* *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

Consequently, the Court finds that Plaintiff Adoption S.T.A.R. lacks standing to pursue its claims. The Court also notes, however, that given today's ruling, *the question of Adoption S.T.A.R.'s standing is ultimately of no practical effect.*

Happy Adoption Day

Words and Music by John McCulcheon

© 1992 John McCutcheon/Appalsongs (ASCAP)

Oh who would have guessed, who could have seen

Who could have possibly known

All these roads we have traveled, the places we've been

Would have finally taken us home.

So here's to you, three cheers to you

Let's shout it, “Hip, hip horray!”

For out of a world so tattered and torn,

You came to our house on that wonderful morn

And all of a sudden this family was born

Oh, happy Adoption Day!

There are those who think families happen by chance

A mystery their whole life through

But we had a voice and we had a choice

We were working and waiting for you.

So here's to you, three cheers to you

Let's shout it, “Hip, hip horray!”

For out of a world so tattered and torn,

You came to our house on that wonderful morn

And all of a sudden this family was born

Oh, happy Adoption Day!

No matter the time and no matter the age

No matter how you came to be

No matter the skin, we are all of us kin

We are all of us one family.

So here's to you, three cheers to you

Let's shout it, “Hip, hip horray!”

For out of a world so tattered and torn,

You came to our house on that wonderful morn

And all of a sudden this family was born

Oh, happy Adoption Day!

FN27. The Court STAYS enforcement of this Order and the Permanent Injunction until the parties have briefed whether or not this Court should fully stay its Orders until completion of appeal to the United States Court of Appeals for the Sixth Circuit and the United States Supreme Court. The Court is inclined to stay its finding of facial unconstitutionality but not to stay the Orders as to the as-applied claims of the four couples who are Plaintiffs because they have demonstrated that a stay will harm them individually due to the imminent births of their children and other time-sensitive concerns. The Court inclines toward a finding that the issuance of correct birth certificates for Plaintiffs' children, due in June or earlier, should not be stayed. The Court is further inclined to conclude that the Defendants will not be harmed by compliance with the requirements of the United States Constitution. Neverthe-

> less, Plaintiffs shall file today their memorandum *contra* Defendants' oral motion to stay, and Defendants shall file a reply memorandum before 3:00 p.m. tomorrow. The Court shall then rule expeditiously.

S.D.Ohio,2014.
Henry v. Himes
--- F.Supp.2d ----, 2014 WL 1418395 (S.D.Ohio)

END OF DOCUMENT

Slip Copy, 2012 WL 605548 (Tenn.Ct.App.)
(Cite as: 2012 WL 605548 (Tenn.Ct.App.))

H

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
William Robert LINDSLEY
v.
Lisa Whitman LINDSLEY.

No. E2011–00199–COA–R3–CV.
Dec. 7, 2011 Session.
Feb. 27, 2012.

Appeal from the Circuit Court for Blount County, No. E–22576; Jon Kerry Blackwood, Senior Judge.
Brett D. Stokes, Knoxville, Tennessee, for the appellant, William Robert Lindsley.

Damon Wooten, Maryville, Tennessee, for the appellee, Lisa Whitman Lindsley.

CHARLES D. SUSANO, JR., J., delivered the opinion of the Court, in which D. MICHAEL SWINEY and JOHN W. McCLARTY, JJ., joined.

OPINION

CHARLES D. SUSANO, JR., J.

1** William Robert Lindsley ("the plaintiff') filed this action for divorce against Lisa Whitman Lindsley ("the defendant"). The defendant, along with her answer, asserted a counterclaim asking that the marriage be declared void for bigamy predicated upon the fact that the plaintiff was married when he purported to marry her. The plaintiff obtained a divorce from his previous wife before the parties to this action separated. The defendant filed a motion for summary judgment asking that their marriage be declared void. The trial court granted the defendant summary judgment and the plaintiff appealed. In *Lindsley v. Lindsley*, No. E2008–02525–COA–R3–CV, 2010 WL 2349200 (Tenn. Ct.App. E.S., filed June 11, 2010) ("Lindsley I*** ") we held that "under Texas law where [the parties were] married, ... they could, under the [Texas] statute, enter into a common-law marriage after the spouse was divorced in the prior marriage." *Id.* at * 1. Accordingly, we reversed the trial court upon finding that there was a "disputed issue of fact ... whether the parties entered into a common-law marriage after the plaintiff's prior marriage ended." *Id.* We remanded "for a determination of this factual issue." *Id.* On remand, the trial court heard evidence and held that the plaintiff did not satisfy his burden of showing that the parties' cohabitation established the elements of a common law marriage under Texas law. The plaintiff appeals. We affirm.

I.

In 1997, the parties lived together in California. While on a trip to Texas, they obtained a marriage license and were "married" in a ceremony officiated by a priest and attended by family and friends. Unbeknownst to the defendant, the plaintiff was still married to his previous wife, Debra Lindsley. Apparently, either the plaintiff or Debra Lindsley had not pursued to conclusion a divorce action that one or the other of them had initiated. After the Texas marriage ceremony, the parties returned immediately to California. In 2003, they learned that the plaintiff's previous marriage had not been dissolved. Thereafter, on or about June 16, 2003, the plaintiff obtained a divorce from Debra Lindsley. The parties continued to cohabit in California until 2007. In 2007 they moved to Tennessee and continued to cohabit until they separated in this state in July 2008. Following the parties' separation, the plaintiff filed this action for divorce.

In ***Lindsley I,*** we recognized that even though Tennessee law does not permit common-law mar-

riages to be contracted in this state, nor does it allow ratification of such marriages, "if the Lindsleys have contracted a valid common-law marriage in a state that recognizes such marriages, Tennessee Courts will likewise recognize their marriage as valid." *Id.* at * 3. Ultimately, we concluded that California is like Tennessee in that it does not allow common law marriages but that it would also recognize a common law marriage contracted in another state. *Id.* at 5. Thus, the question was whether the parties could have entered a common law marriage under Texas law by their co-habitation in California and Tennessee. *Id.* at 4. We stated:

> ***2** Texas law provides that a marriage entered into when one of the parties is already married is void. However, if the first marriage is later dissolved, the latter marriage may become valid under certain circumstances. Tex. Fam.Code Ann. § 6.202 provides as follows:
>
> (a) A marriage is void if entered into when either party has an existing marriage to another person that has not been dissolved by legal action or terminated by the death of the other spouse.
>
> (b) The later marriage that is void under this section becomes valid when the prior marriage is dissolved if, after the date of the dissolution, the parties have lived together as husband and wife and represented themselves to others as being married.
>
> Texas courts have consistently interpreted Tex. Fam.Code Ann. § 6.202(a) to mean that a marriage is void if entered into when either party has an existing marriage. *However, the later marriage becomes valid when the prior marriage is dissolved if, after the date of the dissolution, the parties have lived together as husband and wife and represented themselves to others as being married. Omodele v. Adams,* No. 14–01–00999–CV, 2003 WL 133602 at *3 (Tex.App.Houston [14 Dist.], Jan. 16, 2003); *Garduno v. Garduno,* 760 S.W.2d 735, 741 (Tex.App.Corpus Christi 1988). The Texas courts have also held that when a person continues to live with his or her spouse after the spouse's divorce in a previous marriage, a common-law marriage exists that may be the subject of divorce. *Omodele* at * 3 (*citing Potter v. Potter,* 342 S.W.2d 800, 801 (Tex.Civ.App.Dallas 1961, 2003)).
>
> The party seeking to establish the existence of a common law marriage after the impediment to the marriage has been removed bears the burden of proving that the parties continued to co-habitate [sic] as man and wife and held themselves out to others as married after the impediment was removed. *Garduno* at 741; *Rodriguez v. Avalos,* 567 S.W.2d 85, 86 (Tex.Civ.App.1978). There is no requirement that the parties had to be living in Texas when the impediment was removed but they then lived together and held themselves out to others to be man and wife. *Durr v. Newman,* 537 S.W.2d 323, 326 (Tex.Civ.App.1976).
>
> Under Tex. Fam.Code Ann. § 6.202(a) the parties' 1997 marriage was void when they entered into it due to Mr. Lindsley's still existing first marriage. When the prior marriage was dissolved in 2003, the impediment to the marriage between the parties was removed and a valid common law marriage came into existence after the date of the dissolution as long as the parties lived together as husband and wife and represented themselves to others as being married. Tex. Fam.Code Ann. § 6.202(b). There is no question that the Lindsleys did not live together as husband and wife or hold themselves out to others as married in Texas, but a Texas domicile is not required for Section 6.202(b) to effect a common-law marriage once the impediment is removed. The Trial Court can look to the Lindsleys' behavior in California from 2003 until the time they moved to Tennessee and also to their behavior in Tennessee from 2007 until their separation on July 4, 2008 to

determine whether they met the requirements of Section 6.202(b) to establish a common-law marriage. *See Durr v. Newman* at 326.

***3** As there is a genuine issue of material fact as to whether the Lindsleys lived as husband and wife and held themselves out to others after plaintiff obtained a divorce [from] his first wife, it is necessary that this case be remanded to the Trial Court for such a determination.

Lindsley I at *3–5 (footnotes omitted; emphasis added).

We have reviewed all of the evidence admitted in the hearing on remand. The trial court's summary of that evidence as reflected in its findings and conclusions filed December 2, 2010, is accurate and will complete the factual and procedural foundation for this appeal:

The Court must look to the conduct of the parties after ... [the plaintiff's] prior marriage ... [was] dissolved. According to the testimony, [the plaintiff] was in financial difficulties with the IRS and was attempting to determine the child support payments he had made during his prior marriage when he learned that the marriage had not been dissolved. [The defendant] testified that at that time she considered that she was in a bigamous relationship and did not consider [the plaintiff] as her husband. Consequently, the parties began legal proceedings in California to dissolve [the plaintiff's] prior marriage. Prior to 2003, the parties had filed joint tax returns. After 2003, [the defendant] filed tax returns as head of household. She also amended her previous tax returns to reflect this status. The parties continued to live together, but [the defendant] considered that they were domestic partners, not husband and wife. When [the plaintiff's] health insurance elapsed, [the defendant] had [the plaintiff] added to her health insurance policy as spouse, but explained that she had discussed the living arrangement with her employer and that his relationship was as a domestic partner. The parties continued to reside in California and to cohabit. [The defendant] also testified that she repeatedly requested of [the plaintiff] that they undertake a ceremonial marriage, but he declined. During their period of cohabitation, ... the parties maintained their separate financial arrangements. At times [the plaintiff] would contribute to car payments and [the defendant] would provide financial assistance to [the plaintiff's] business. [The plaintiff] was in financial trouble for a period of time and [the defendant] acted in a manner to protect herself from his financial plight. Very little evidence was introduced to explain the day-to-day living financial arrangements between the parties.... The parties took "family vacations" periodically in which their child and [the plaintiff's] child from the previous marriage attended. There was no evidence except from the parties about how the parties held themselves out in California and from [the defendant's] conduct concerning the parties' legal obligations in California after learning of the prior existing marriage and that [the defendant] was concerned about insulating herself from any financial liability she might incur with the IRS because of the parties' arrangement. Once the parties moved to Tennessee, she purchased real estate in her own name and operated businesses without the involvement of [the plaintiff]. When [the plaintiff] encountered financial difficulty in Tennessee, [the defendant] loaned him Forty Thousand Dollars. However, this transaction was evidenced by a promissory note with collateral. This promissory note was listed as a debt by [the plaintiff] ... in his Petition for Bankruptcy that he filed in December 2008. Also, in this Petition he swore under oath that he was unmarried, which is in complete contradiction to his position that the parties were married. [The defendant] did seek and obtain an Order of Protection in which she listed [the plaintiff] as husband. However, later in that document she explained that the parties' ceremonial

marriage occurred during the time that [the plaintiff] was still married. The only evidence of "holding out" was an email wherein [the defendant] referred to "hubbie," and an electrician's testimony that both parties referred to each other as husband and wife.

***4** In reviewing the testimony, the Court finds that [the defendant's] testimony is the more credible and is supported by her conduct after she learned that [the plaintiff's] prior marriage had not been dissolved. After this discovery, she maintained that the parties were not married. She co-operated [sic] with legal counsel to take the steps necessary to dissolve [the plaintiff's] prior marriage. However, she recognized that she did not wish to expose herself to any liability as a result of the mistaken impression that she was married. She amended her tax returns that were filed before her discovery of the prior marriage so that her proper status would be consistent to her true status. Thereafter, she filed tax returns as "head of household" rather than a joint return. When the parties moved to Tennessee, she purchased property and operated businesses in her own name. When [the plaintiff] needed money for his business, she required that he execute a promissory note with collateral. Finally, she repeatedly asked [the plaintiff] to engage in a valid marriage ceremony for which he declined. The mere fact that the parties were introduced as husband and wife is not sufficient to establish a common law marriage. More importantly, it is clear to the Court that after discovery of the undissolved marriage, the record does not support that there was a present agreement to be husband and wife. The parties may have continued to cohabit, but the Court finds that [the defendant] consistently believed they were not husband and wife unless and until a valid ceremony was conducted. The Court finds that there was no mutual agreement between the parties to be married.

[The plaintiff] bears the burden to prove the existence of a valid common law marriage. The Court finds that he has failed to meet this burden and this Complaint for Divorce is dismissed with costs assessed against [the plaintiff].

The trial court entered an order declaring the marriage null and void ab initio because "the parties did not hold themselves out to be married and ... there was no mutual agreement between the parties to be married." The plaintiff filed this appeal.

II.

We have restated the issues the plaintiff attempts to raise as follows:

Whether the court violated our instructions in ***Lindsley 1*** on remand.

Whether the trial court erred in holding that the marriage was void ab initio.

Whether the defendant has committed fraud on the court by perjury that should result in entry of a judgment in favor of the plaintiff.

Whether the evidence preponderates against the trial court's findings.

III.

In a case tried without a jury, we review the trial court's findings of facts de novo upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R.App. P. 13(d); *In re Angela E.*, 303 S.W.3d 240, 246 (Tenn.2010). Conclusions of law are reviewed de novo with no presumption of correctness. *Id.*

IV.

5** The plaintiff argues that the trial court violated our instructions on remand in ***Lindsley I by requiring that, during the cohabitation, there be a "mutual agreement between the parties to be married." In ***Lindsley I*** we looked to *Durr v. Newman*, 537 S.W.2d 323, 326 (Tex.Civ.App.1976) for the standard, under

Texas law, to establish a common-law marriage by ratification after removal of the impediment of bigamy. ***Durr*** clearly holds that the acts that amount to ratification do not have to take place in the state of Texas. The appellant in ***Durr*** also argued that ratification cannot occur unless there is proven a new agreement to be married. The ***Durr*** court rejected the argument stating that the statute, now Tex. Fam.Code Ann. § 6.202(b), imposes a tacit agreement upon "parties [who continue to] live together as husband and wife and represent themselves to others as being married." *Id.* at 326. The trial court on remand in the present case stated that the requirements are "a present agreement to be husband and wife; living together as husband and wife; and holding each other out to the public as such." *Garduno v. Garduno,* 760 S.W.2d 735, 741 (Tex.App. Corpus Christi 1988). It is true that the ***Garduno*** lists the same three requirements as the "elements of a common law marriage." *Id.* at 738. However, at the point in the ***Garduno*** opinion where the court considered the concept of ratification under the statute, it went on to state, in complete accord with ***Durr,*** that the void marriage becomes valid if, after removal of the impediment, "the parties have lived together as husband and wife and represented themselves to others as being married." *Garduno,* 760 S.W.2d at 741.

Thus, we agree with the plaintiff that, in alluding to the concept of a present intent to be married, the trial court imposed an element that is not required by Texas law under the facts of this case. We do not agree with the plaintiff that the trial court simply disregarded our opinion or that reversal is required. We cited the ***Garduno*** opinion in ***Lindsley I.*** We are convinced that the trial court attempted on remand to follow the law we cited but mistakenly looked to language in ***Garduno*** that does not directly apply to ratification after removal of an impediment. Nevertheless, the trial court did, *also,* consider the part of ***Garduno*** that is pertinent, *i.e.,* whether the parties lived together and held themselves out as married after removal of the impediment. We are instructed by Tenn. R.App. P. 36(b) that we are not to set aside a final judgment unless "considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." The trial court also found that "the parties did not hold themselves out to be married." For reasons we will more fully explain later in this opinion, we conclude that the evidence does not preponderate against the trial court's finding that the parties did not hold themselves out as married. Accordingly, we hold that the error of requiring a present agreement to be married did not affect the judgment. The court, despite the error, reached the correct conclusion.

6** The plaintiff also argues that the trial court erred in declaring the marriage void from the beginning. He suggests that such a finding is inconsistent with both the Texas statute, § 6.202, and our holding in ***Lindsley I. We disagree on both points. The statute expressly states that a bigamous "marriage is void." It later states that the "marriage that is void" may become valid if certain conditions are met. Those conditions were not met in this present case as the trial court found. In ***Lindsley I,*** we stated that, under the Texas statute, "the parties' 1997 marriage was void," but could, depending on the proof on remand, possibly become a marriage by virtue of the parties actions after 2003. *Id* . at *6.

To keep this from being a purely academic question, the plaintiff suggests that the Texas statute of limitations for declaring a marriage void is one year from the date of the marriage, citing, Tex. Fam.Code Ann. § 6.109(b). Presumably, if we agreed with the plaintiff that the marriage was voidable, and not void, we would need to consider whether the defendant waited too long to challenge the status of the marriage. We stress the fact that the marriage was void under Texas, and therefore had no legal effect in Tennessee, as found by the trial court. Thus, we do not agree with the plaintiff's proposition underlying the need to look at the Texas statute of limitations.

However, even if we were to treat the marriage as merely voidable, we do not agree with the plaintiff that the statute of limitations he relies on is applicable. By its express terms, § 6.109 is limited to a narrow set of facts: (1) one party to the marriage obtained a divorce from a third party within 30 days of the marriage ceremony; (2) the offended spouse did not know or have reasonable basis to know of the divorce; and (3) the offended spouse discontinued cohabitation upon learning of the recent divorce. Under such an unusual set of facts, the offended spouse may seek to void or annul the marriage under Texas law, but must do so within one year of the date of the marriage. *Id.* § 6.109(b). It is undisputed in the present case that the plaintiff did not obtain a divorce within 30 days of marrying the defendant and it is also undisputed that the defendant did not even learn the plaintiff was still married to another woman until 2003. Thus, we find no merit in the plaintiff's contention that the defendant waited too long to challenge the marriage.

The two remaining issues both involve the defendants' credibility and should be discussed together. The trial court specifically found that the defendant's "testimony is the more credible and is supported by her conduct after she learned that [the plaintiff's] prior marriage had not been dissolved." We cannot stress this finding too highly because "[i]n a case tried without a jury, the question of credibility of the witnesses is exclusively for the trial judge...." *Harwell v. Harwell*, 612 S.W.2d 182, 184 (Tenn.Ct.App.1980). Further, "on an issue which hinges on witness credibility, [the trial court] will not be reversed unless, other than the oral testimony of the witnesses, there is found in the record clear, concrete and convincing evidence to the contrary." *Givler v. Givler*, 964 S.W.2d 902, 905 (Tenn.Ct.App.1997) (*quoting Tennessee Valley Kaolin Corp. v. Perry*, 526 S.W.2d 488, 490 (Tenn.Ct.App.1974)).

***7** The plaintiff acknowledges the above principles, but tries to do indirectly what he cannot do directly by arguing that the defendant perjured herself and that, in light of the defendant's perjury, the evidence preponderates against the trial courts finding of fact that the parties did not hold themselves out as married. In our opinion, the alleged perjury is nothing but a fabrication of the zealousness with which the plaintiff advances his position.

The point most strenuously argued by the plaintiff is that the defendant denied ever holding herself out as the plaintiff's wife, and him as her husband, in responding to a request to admit, yet, admitted at the hearing, "There are times in my past I have held myself out to be his wife." The context of the testimony makes it clear that the defendant readily admitted that she thought she was married and acted like she was married *until* the prior undissolved marriage was revealed and after that she thought she was not married and did not hold herself out as married.

The plaintiff also points to an insurance application wherein the defendant referred to the plaintiff as her spouse. We are unable to locate the insurance application in the record. The defendant testified without objection that she listed the plaintiff as her spouse only after discussing the true status with her employer. It was her understanding, based on the policies of her employer, that for the purposes of the application an unmarried partner was treated as a spouse. The plaintiff argues that the defendant's perjury, in denying she held the plaintiff out as her husband, is revealed in a petition for order of protection wherein she listed him as "husband ." However, paragraph 6 on page 2 of the same petition provides additional context which makes her statements on the petition consistent with her testimony at the hearing: "Respondent married petitioner while he was still married to his former wife, without petitioner's knowledge."

The plaintiff also argues that the defendant must be lying because her testimony is at odds with his. We do not find the plaintiff's reliance on his own testimony convincing. As the trial court noted, the plaintiff

listed himself as single in his bankruptcy petition. Further, the trial court had the opportunity to observe the demeanor of both parties and found the defendant to be the more credible of the two and consistent with the parties' actions in listing themselves as unmarried when acquiring property and filing numerous public documents.

Finally, the plaintiff points us to the testimony of an electrician who did some work where the parties resided and testified that they referred to each other as husband and wife. It is clear, however, under Texas law that "occasional introductions as husband and wife do not establish the element of holding out." *Winfield v. Renfro,* 821 S.W.2d 640, 651 (Tex.App.1991).

In summary, we have considered the plaintiff's arguments related to alleged perjury and the preponderance of the evidence and find no merit in them. We do not find any inconsistency in the defendant's testimony, much less intentional false testimony. We hold that the evidence does not preponderate against the trial court's findings.

V.

***8** The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, William Robert Lindsley. This case is remanded, pursuant to applicable law, for collection of costs.

Tenn.Ct.App.,2012.
Lindsley v. Lindsley
Slip Copy, 2012 WL 605548 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.3d, 2008 WL 2600692 (Tenn.Ct.App.)
(Cite as: 2008 WL 2600692 (Tenn.Ct.App.))

Court of Appeals of Tennessee.
Newt OCHALEK
v.
Donnie L. RICHMOND.

No. M2007-01628-COA-R3-CV.
Assigned on Briefs Feb. 8, 2008.
June 30, 2008.

Appeal from the Chancery Court for Dickson County, No. 10156-06; Larry J. Wallace, Judge.
Joseph Lee Johnson, Fulton, Kentucky, for the appellant, Donnie L. Richmond.

Jack L. Garton, Dickson, Tennessee, for the appellee, Newt Ochalek.

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

MEMORANDUM OPINION[FN1]

FN1. Tenn. R. Ct.App. 10 states:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

ANDY D. BENNETT, J.

***1** This is an appeal from a declaratory judgment action concerning the validity of a marriage. Purported wife died intestate; deceased's son sought declaration that her marriage to defendant was void *ab initio* for purposes of administering decedent's estate. The proof showed that defendant and deceased participated in a wedding ceremony but that defendant forged the officiating minister's signature on the marriage license and certificate following the ceremony. The trial court declared the marriage void as a matter of law. We affirm.

Appellee Newt Ochalek is the son of Patricia D. Gills who died intestate on September 29, 2005. Following her death, Mr. Ochalek filed a complaint for declaratory judgment seeking to have the purported marriage of Ms. Gills and Appellant Donnie L. Richmond declared void *ab initio.* According to Mr. Ochalek, Ms. Gills participated in a staged wedding ceremony on July 22, 1997, "on a whim" but never intended to marry Mr. Richmond and never held herself out to be married. Mr. Richmond challenged Mr. Ochalek's standing to contest the validity of the marriage arguing the marriage was, at most, voidable, which abated any right to challenge the marriage upon the death of Ms. Gills.

The Chancery Court for Dickson County found that Mr. Ochalek had standing to bring the action and a bench trial was held on January 26, 2007. The evidence revealed that an application for a marriage license was submitted to the Dickson County Court Clerk on June 16, 1997. The application, entitled "Marriage Record," was signed by "Patricia D. Haley" and "Donnie Richmond." The signature "Patricia D.

Haley" was alleged to be that of Mr. Ochalek's mother, whose divorce from her former husband, Robert Haley, was finalized months before in late 1996. Mr. Ochalek, however, noted that the name "Patricia Gills" was legally restored to her and was the name she used at the time the application was filed.

Shortly after the application was filed, a ceremony was held on June 22, 1997, at Montgomery Bell State Park in Dickson County. William E. Ingrum, an ordained minister and Mr. Richmond's brother, officiated the ceremony. Mr. Ingrum said he saw the marriage license before performing the wedding. However, Mr. Ingram "did not sign the marriage record, marriage certificate, or tear-off slips." Mr. Richmond later forged Mr. Ingrum's signature on these documents as well as on the Tennessee Department of Health's Certificate of Marriage, or vital statistics form, and submitted them to the Dickson County clerk. Despite her alleged marriage to Mr. Richmond, the evidence showed that Ms. Gills continued to use the name "Patricia Gills," filed tax returns as a single individual under the same name, applied for social security benefits in the name of her deceased ex-husband, and named only her four children as the primary beneficiaries of her life insurance policy in 2003. None of Ms. Gills' children were present at the wedding ceremony.

***2** Based on the evidence presented, the court found as fact that Mr. Richmond signed the officiating minister's name to the tear-off portion of the marriage license and vital statistics form; Ms. Gills did not consider herself to be married and did not put herself forward in the community as a married woman; a valid marriage license was never issued to Ms. Gills or Mr. Richmond; and Ms. Gills and Mr. Richmond attempted to perpetrate a fraud on certain creditors as well as the state and federal government. The court held the marriage void as a matter of law by order entered March 26, 2007. Mr. Richmond appeals, taking issue with the court's determinations that standing was proper, a valid marriage license was never issued, the forgery invalidated the marriage even if solemnized by ceremony, and certain reputation and character evidence was relevant to the facts at issue.

ANALYSIS

We review a trial court's findings of fact de novo upon the record, accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R.App. P. 13(d). However, we review conclusions of law de novo with no presumption of correctness on appeal. *Emmit v. Emmit,* 174 S.W.3d 248, 251 (Tenn.Ct.App.2005) (citing *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn.1993)). Because the trial court observes the witnesses as they testify, it is in the best position to assess witness credibility. *Frazier v. Frazier,* No.W2007-00039-COA-R3-CV, 2007 WL 2416098, *2 (Tenn.Ct.App. Aug. 27, 2007) (citing *Wells v. Tenn. Bd. of Regents,* 9 S.W.3d 779, 783 (Tenn.1999)). Therefore, we give great deference to the court's determinations on matters of witness credibility. *Id.* "Accordingly, we will not reevaluate a trial judge's credibility determinations unless they are contradicted by clear and convincing evidence." *Id.* In this case, the court expressly stated that it "witnessed the demeanor of the witnesses" and found that Mr. Richmond was not credible and discounted his testimony; the court found Mr. Ochalek to be a credible witness and gave "great weight to his testimony."

Standing

We first address Mr. Richmond's argument that Mr. Ochalek lacked standing to contest his marriage to Ms. Gills. Mr. Richmond claims that any right to challenge the validity of the marriage abated upon her death because Mr. Ochalek failed to prove the marriage was void. We find this argument to be without merit.[FN2]

FN2. Mr. Richmond's argument is based on Tenn.Code Ann. § 36-3-306 which forgives certain technical deficiencies to the extent that a "[f]ailure to comply with the require-

> ments of §§ 36-3-104-36-3-111 shall not affect the validity of any marriage consummated by ceremony." Tenn.Code Ann. § 36-3-306 does not apply to the issue of standing and is inapplicable in this case based on our determination that the marriage was void for failure to comply with Tenn.Code Ann. § 36-3-303(a) as discussed below.

Our Supreme Court has recognized standing as a judge-made doctrine "used to refuse to determine the merits of a legal controversy irrespective of its correctness where the party advancing it is not properly situated to prosecute the action." *Knierim v. Leatherwood,* 542 S.W.2d 806, 808 (Tenn.1976). This case was brought as a declaratory judgment action under Tenn.Code Ann. § 29-14-101, *et seq.* The Declaratory Judgment Act explicitly provides:

> *Any person* interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent ... may have a declaration of rights or legal relations in respect thereto to: (1) *ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others* [.]

***3** Tenn.Code Ann. § 29-14-105(1) (emphasis added).

Mr. Ochalek is the son of Patricia Gills and a person entitled to inherit under the laws of intestacy. He testified that Ms. Gills wanted him to administer her estate and that she instructed Mr. Ochalek in the days before her death on how she wanted it divided. Ms. Gills' marital status is a viable legal issue affecting the administration of her estate, the resolution of which is necessary in order to ascertain the individuals entitled to take from her estate.[FN3] We find that Mr. Ochalek is a proper person to challenge the marital status of Ms. Gills and affirm the trial court's ruling that he had standing to prosecute the action.

> FN3. The estate of Patricia Gills is to be administered in Graves County, Kentucky, where she resided.

Validity of the Marriage

In Tennessee, the law of marriage is controlled by statute and is not governed by common law rules. *Coulter v. Hendricks,* 918 S.W .2d 424, 427 (Tenn.Ct.App.1995). A marriage solemnized by ceremony is presumed valid; however, the presumption may be rebutted by cogent and convincing evidence. *Guzman v. Alvares,* 205 S.W.3d 375, 380 (Tenn.2006) (citing *Aghili v. Saadatnejadi,* 958 S.W.2d 784, 789 (Tenn.Ct.App.1997)); *see also Huey Bros. Lumber Co., Inc. v. Anderson,* 519 S.W.2d 588, 590 (Tenn.1975) (citing *Gamble v. Rucker,* 137 S.W. 499 (Tenn.1911)). Our courts have also recognized the mandatory nature of the marriage license requirement. *Harlow v. Reliance Nat'l,* 91 S.W.3d 243, 245 (Tenn.2002); *Stovall v. City of Memphis,* No.W2003-02036-COA-R3-CV, 2004 WL 1872896, *3 (Tenn.Ct.App. Aug. 20, 2004). "Before being joined in marriage, the parties shall present to the minister or officer a license under the hand of a county clerk in this state, directed to such minister or officer, authorizing the solemnization of a marriage between the parties." Tenn.Code Ann. § 36-3-103(a). Thus, obtaining a marriage license is a condition precedent to the solemnization of a valid marriage under Tennessee Law. Op. Tenn. Atty. Gen. No. 06-110, 2006 WL 2104254 (July 12, 2006) (citing Tenn.Code Ann. § 36-3-103(a)). Additionally, the "[o]ne authorized by § 36-3-301 who solemnizes the rite of matrimony *shall endorse on the license the fact and time of the marriage, and sign the license,* and return it to the county clerk within three (3) days from the date of marriage. Every person who fails to make such return of the license commits a Class C misdemeanor." Tenn.Code Ann. § 36-3-303(a) (emphasis added).

The trial court found that an application for a marriage license was made in Dickson County.[FN4] However, the court found that "[a] valid license to marry was never issued by the Dickson County court clerk." The order does not clearly state what evidence the court based these findings on but does conclude that "[t]he marriage license was not properly signed by the officiant pursuant to Tenn.Code Ann. § 36-3-303" and further, that it "was fraudulently signed as prohibited by Tenn.Code Ann. § 36-3-112." [FN5] As a result, the trial court declared the marriage between Ms. Gills and Mr. Richmond void. Because we find the evidence does not preponderate against the trial court's finding that there was no marriage license validly signed by the officiant, we must affirm the judgment of the trial court.

FN4. The court made no finding regarding the validity of the signature "Patricia D. Haley" on the application.

FN5. "Fraudulently signing or knowingly using any false document purporting to be one provided for in § 36-3-104(a) [marriage license] or § 36-3-106 [signature of parents, guardian, next of kin, or custodian required when applicant is a minor] is a Class C misdemeanor." Tenn.Code Ann. § 36-3-112.

***4** Dickson County Clerk Phil Simons testified that when a couple applies for a marriage license, his office is to verify their identity, age, and social security numbers. A deputy clerk had apparently taken this information from Patricia Gills and Donnie Richmond. Mr. Simons's signature appears on the Marriage Record. There is no explanation in the record of the timing or procedure used for issuing a marriage license to the parties, but once issued, a license is only valid for thirty days. Tenn.Code Ann. § 36-3-103(a). Mr. Simons provided the perforated tear-off portions of the Marriage Certificate and the vital statistics form that were filed with his office. Appearing on both sides of the tear-off portion to the Marriage Certificate is a disclaimer that reads: "This Marriage License is 'VOID' if not used within 30 days from date of issue." Below this disclaimer is where the authorized officiant is supposed to sign and verify the solemnization of the marriage. Mr. Simons testified that if a party had returned these documents to the clerk's office without the officiating minister's signature, there would be no valid marriage.

Mr. Richmond admits to forging Mr. Ingram's signature on both the marriage certificate and vital statistics form submitted to the county clerk's office. He testified that "he did not initially have his brother sign the marriage license after the ceremony because he and Patricia were not sure if they wanted to finalize the marriage due to his bad credit." Mr. Richmond claims that "a couple days later," Ms. Gills said she wanted to be married, so he forged the minister's name only in an effort to comply with the three-day filing requirement.

Mr. Richmond relies on *Aghili v. Saadatnejadi*, 958 S.W.2d 784 (Tenn.Ct.App.1997), to support his argument that a marriage solemnized by ceremony should not be invalidated solely because the marriage license was improperly endorsed. In *Aghili*, the officiant signed the marriage license following the ceremony but failed to return it to the court clerk within three days as prescribed by Tenn.Code Ann. § 36-3-303(a). *Aghili*, 958 S.W.2d at 786. In upholding the validity of the marriage, the court noted "[t]he purpose of the filing requirement in Tenn.Code Ann. § 36-3-303 is to assure the preservation of a *reliable, accurate record of a marriage.*" *Id.* at 788 (emphasis added). Requiring the signature of the individual who personally officiated the ceremony is the best way to fulfill the purpose of the statute and ensure that the record made is reliable.

It has been suggested that the requirements of Tenn.Code Ann. § 36-3-303(a) are directory, rather than mandatory. *See* Richards on Tennessee Family Law § 3-1(a)(1) (2006). This argument rests on the

fact that Tenn.Code Ann. § 36-3-303(a) provides for a criminal penalty to be assessed against the officiant, not the couple, for failure to comply with the filing requirement. *Id. Aghili* certainly stands for the proposition that the three-day filing requirement is directory as to the bride and groom. No penalty for failure to timely file the license is prescribed for them. Tenn.Code Ann. § 36-3-303(a) places the burden of returning the signed license to the county clerk within three days of the marriage on the one who solemnizes the marriage and the failure to do so is a misdemeanor. Tenn.Code Ann. § 36-3-303(a). So, as to the officiant, the filing requirement is mandatory.

***5** We do not believe the legislature intended to invalidate a marriage solely because the person who solemnized the marriage failed to return the license within three-days. We cannot, however, conclude that the legislature merely suggested that the officiant sign the license or that forging the officiant's name is permissible. Such a conclusion would contradict the plain, mandatory language used in the statute: the officiant "*shall*[FN6] *endorse* on the license the fact and time of the marriage, and sign the license...." Tenn.Code Ann. § 36-3-303(a) (emphasis added). Only after the marriage license is returned and is properly signed by the officiant can the county clerk record the marriage and certify the license. Tenn.Code Ann. § 36-3-103(c)(1).[FN7] Thus, the statutory scheme suggests the legislature intended the signature requirement to be mandatory because the marriage license cannot be recorded and certified without the signature of the officiant.

FN6. The word "shall" is ordinarily construed as being mandatory. *Stubbs v. State,* 393 S.W.2d 150, 154 (Tenn.1965) (citing *Louisville & N.R. Co. v. Hammer,* 236 S.W.2d 971, 973 (Tenn.1951)).

FN7. Tenn.Code Ann. § 36-3-103(c)(1) provides in part that "[t]he county clerk issuing a marriage license is hereby authorized to record and certify any license used to solemnize a marriage that is properly signed by the officiant when such license is returned to the issuing county clerk."

It is irrelevant whether or not Mr. Ingram would have signed the documents had he been asked. The fact is Mr. Ingram did not sign the marriage license or marriage records. Instead, Mr. Richmond knowingly signed Mr. Ingram's name and filed the forgeries with a county official of the State of Tennessee. "It is well settled in Tennessee that the courts of our State will not be utilized to enforce a contract which is the product of fraud; indeed, fraud vitiates all that it touches." *Shelby Elec. Co., Inc. v. Forbes,* 205 S.W.3d 448, 455 (Tenn.Ct.App.2005). "Fraud vitiates and avoids all human transactions, from the solemn judgment of a court to a private contract. It is as odious and as fatal in a court of law as in a court of equity." *Id.* (quoting *New York Life Ins. Co. v. Nashville Trust Co.,* 292 S.W.2d 749, 754 (Tenn.1956)). Mr. Richmond will not be entitled to benefit from his wrongdoing. As such, we will treat the marriage license as unsigned and therefore incomplete and invalid. *See* Tenn.Code Ann. § 36-3-103(c)(1). Because the proof in the record shows the requirements of Tenn.Code Ann. § 36-3-303 and for validly recording and certifying the marriage license were never met, we affirm the trial court's determination that the marriage is void.

We find *Harlow v. Reliance Nat'l,* 91 S.W.3d 243 (Tenn.2002), instructive to our analysis of the other issues raised on appeal. In *Harlow,* the plaintiff and putative widow sought worker's compensation benefits as the surviving spouse of the deceased. *Harlow,* 91 S.W.3d at 245. The plaintiff and deceased were divorced in 1994 but reconciled the following year and participated in a "remarriage" ceremony in 1997. *Id.* at 244. The couple lived together as husband and wife, were known in the community to be husband and wife, and represented they were husband and wife on a loan application and other documents. *Id.* at 244-45. However, the couple never obtained a marriage li-

cense either before or after the ceremony. *Id.* at 244. The couple knew that no license existed and, accordingly, filed separate individual tax returns as "single" or as "head of household." *Id.* at 245. Despite their participation in a marriage ceremony and actions as spouses, the Special Workers' Compensation Appeals Panel of the Tennessee Supreme Court held that no legal marriage existed based upon the failure to comply with the licensing statute. *Id.* at 247.

***6** Like the Harlows, Mr. Richmond and Ms. Gills participated in a marriage ceremony. Mr. Richmond, whose testimony the court discounted, claims the two cohabitated for eight years following the ceremony. However, Ms. Gills continued to file tax returns as a single individual and continued to go by the name of Patricia Gills in the community and on official documents.[FN8] The court found that Ms. Gills never held herself out in the community to be married and never considered herself to be married. The court based its conclusion on evidence presented by Mr. Ochalek which it found credible, but Mr. Richmond's own testimony casts doubt on whether either party intended to be married even after they participated in the ceremony.

FN8. Of course, this fact alone is not controlling since a woman is not required to adopt the surname of her husband. *Dunn v. Palermo*, 522 S.W.2d 679, 688 (Tenn.1975).

Nonetheless, Mr. Richmond objected at trial and on appeal arguing the evidence of Ms. Gills' state of mind and reputation is irrelevant to whether or not a valid marriage contract existed. Although Mr. Richmond correctly states that Tennessee does not recognize common law marriage contracts which require an intent to be married,[FN9] we agree with the trial court that evidence of Ms. Gills' actions and belief as to her own marital status were important and relevant considerations for the court. And, because we give great deference to the trial court's determinations on credibility, we cannot adopt Mr. Richmond's explanation that Patricia Gills did not assume "Richmond" as her surname in order to shield herself from Mr. Richmond's creditors as the court did not find him to be a credible witness. In addition, the evidence does not preponderate against the court's finding that Mr. Richmond and Ms. Gills attempted to perpetrate a fraud upon creditors, the state, and the federal government.

FN9. Common law marriages are based on the parties' conduct and will be recognized in Tennessee if they are valid under the laws of another state where such marriages are sanctioned. *Bowser v. Bowser*, No. M2001-01215-COA-R3-CV, 2003 WL 1542148, *1 (Tenn.Ct.App. Mar. 26, 2003) (citing *Shelby County v. Williams*, 510 S.W.2d 73, 73-74 (Tenn.1974)). Kentucky does not recognize common law marriage. *Murphy v. Bowen*, 756 S.W.2d 149, 150 (Ky.Ct.App.1988) (citing Ky.Rev.Stat. Ann. § 402.020(3)).

CONCLUSION

Tennessee presumes that regularly solemnized marriages are valid, but this presumption can be overcome. *Aghili*, 958 S.W.2d at 789. In this case, Mr. Ochalek has overcome the presumption with convincing evidence of the marriage's invalidity. The purported marriage between Mr. Richmond and Ms. Gills is void as a matter of law for failure to comply with Tenn.Code Ann. § 36-3-303(a). The judgment of the chancery court for Dickson County is affirmed in all respects. Costs of appeal are assessed against Appellant Donnie L. Richmond for which execution, if necessary, may issue.

Tenn.Ct.App.,2008.
Ochalek v. Richmond
Not Reported in S.W.3d, 2008 WL 2600692 (Tenn.Ct.App.)

Not Reported in S.W.3d, 2008 WL 2600692 (Tenn.Ct.App.)
(Cite as: 2008 WL 2600692 (Tenn.Ct.App.))

END OF DOCUMENT

Not Reported in S.W.3d, 1999 WL 1212435 (Tenn.Ct.App.)
(Cite as: 1999 WL 1212435 (Tenn.Ct.App.))

Court of Appeals of Tennessee.
Lois Hill PAYNE, Plaintiff/Appellee,
v.
Donald P. PAYNE and Terry L. Payne, Defendants/Appellants.

No. 03A01-9903-CH-00094.
Dec. 17, 1999.

Appeal as of right from the Monroe Co. Chancery Court, Earl H. Henley, Chancellor, No 03A01-9903-CH-00094.
Eugene G. Hale, Athens, TN, for the appellant.

J. Lewis Kinkard, Madisonville, TN, for the appellee.

OPINION

SWINEY.

***1** In this case, Lois Hill Payne ("Plaintiff") sued Donald and Terry Payne ("Defendants") seeking a judicial declaration that she was the common law wife under Georgia law of Defendants' father, Cleo ("Tony") Payne, now deceased; that, as such, she was entitled to a marital share of real property owned by the father and sons as tenants in common; and that a quitclaim deed from Tony Payne to his sons of his interest in this real property was void. The Trial Court found for the Plaintiff on all issues and ordered the property sold for partition. While not precisely as stated by the parties, the issues we address in this appeal are as follows: (1) Did the Trial Court err in determining that a common law marriage existed between the Plaintiff and the late Tony Payne; and (2) If the response to issue number one is "no", did the Trial Court err in holding the quitclaim deed from Payne to the Defendants was void. For the reasons stated in this opinion we reverse the judgment of the Trial Court.

BACKGROUND

Plaintiff met Tony Payne in Florida in 1975, at her job as a bartender. He moved into her Florida home on January 1, 1978, and shortly thereafter obtained a divorce from his wife. Payne and Plaintiff lived together in her mobile home in Florida for ten months, then moved to a farm near Tampa, where they lived together for three and one-half years. Plaintiff testified that she and Payne had gotten married in Florida but never filed the marriage license:

We was all out New Year's Eve and got married while we was all drinking. Something was said that made me a little mad, and the man that married us was a friend of ours, and I got them back from him and tore them up before they got to the courthouse.

She also testified they bought several other marriage licenses before they moved to Tennessee, but they never went through another ceremony.

While they were living together in Florida, Plaintiff and Payne traveled to Tennessee on two or three occasions, stopping en route in Georgia to spend the night in different motels. Plaintiff testified that on those occasions Payne registered them at the motels as "Tony and Lois Payne."

Payne and Plaintiff were both originally from Tennessee and wanted to be near their families, so they decided to move back to Tennessee. In May 1982, Payne and two of his seven children, sons Don and Terry Payne (Defendants), purchased a twenty acre tract of unimproved land as tenants in common. A

certificate of deposit belonging to son Don Payne was used as collateral on the loan. Mortgage payments on the property were made by Payne and his sons. In June 1982, Plaintiff and Payne moved from Florida to Tennessee, and Payne and his sons completed the loan documents to close the deal on the property. Plaintiff testified that "I was to have a lifetime dowry there." Payne and Plaintiff began building a house on the property with help from Payne's children. Plaintiff began referring to herself as Lois Payne, "[b]ecause I felt in my heart that I was married to him."

***2** Plaintiff's exhibits at trial included a property insurance bill for 1985-86 listing the property owners as "C. P. Payne and Wife Lois Payne," a federal income tax receipt for 1989 listing the taxpayers as "Cleo P. Payne & Lois J. Payne," who filed the return as "married filing jointly," and a motor vehicle title listing the owners as "C. P. Payne or Lois Payne."

Thirteen years later, on April 14, 1995, Payne, who had learned he was terminally ill with lung cancer, quitclaimed his interest in the real property at issue to his sons, the Defendants. Defendant Don Payne testified that, "we had talked about her living on the place, and I'm not going to say we didn't." Tony Payne died in May 1995. Plaintiff testified that Payne was of sound mind up to the time of his death. She further testified:

Q: Did you and Mr. Payne ever discuss his making out a will?

A: Yeah. But he said he didn't need to do that, said he could trust the boys and they had promised. And both of them told me afterwards that they intended to see that I was taken care of, what their daddy wanted. So I never realized I had a problem.

Plaintiff testified that after Payne's death, his sons told her that she could continue to live on the property so long as she paid the taxes and insurance and kept the property up. However, the house was soon broken into and she became afraid to live there alone. In November 1995, she moved to a homeless shelter in Etowah, where she was provided a free room in exchange for volunteer service to the shelter. After she left, the condition of the house and property deteriorated, in part because Plaintiff collected clothes and furniture for the needy and had no place to store them, so she stored them in and around the house. When someone came on the property and uncovered the items, they got wet from rain, which ruined the donations and made the property look unkept.

Defendant Don Payne testified that, although he and his father had talked about Plaintiff living on the property, " ... when that place became a dump for the whole community up there, we had a problem with it." He said that he and other relatives spent three days cleaning up the garbage and digging a ditch to bury the junk that had been dropped there. Plaintiff testified that she was ill and could not move the stored items, and could not mow the grass because someone took the three riding lawnmowers.

Defendants obtained counsel, who wrote Plaintiff a letter on January 28, 1997, informing her that Defendants were interested in "doing something with the house" and asking her to advise him if she had any claim of any kind so "we could see if we could get something done about that." On the same date, the quitclaim deed of April 14, 1995 was recorded at the register's office, on advice of Defendants' counsel. Plaintiff did not respond to the letter, and Defendants filed a detainer warrant on April 10, 1997. When subsequently deposed, Plaintiff testified that she claimed an interest described as "what their daddy wanted for me ... a home as long as I lived as long as I did not remarry."

***3** Plaintiff then filed this "Complaint for Declaratory Judgment and Partition" in Chancery Court, asking the Court to find that she and Payne were common law husband and wife and that the quitclaim

deed was null and void.

DISCUSSION

Our review is de novo upon the record, accompanied by a presumption of the correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Rule 13(d), T R A P.; *Davis v. Inman,* 974 S.W.2d 689, 692 (Tenn.1998). A Trial Court's conclusions of law are subject to a *de novo* review. *Campbell v. Florida Steel Corp.,* 919 S.W.2d 26, 28 (Tenn.1996).

The Trial Court found:

It is admitted that a common law marriage could not have been created in the State of Tennessee or Florida. However, until 1997 cohabitation in the State of Georgia, under certain conditions, could create a common law marriage. During the course of the relationship between the parties, they on different occasions spent nights together at motels in Georgia as they toured between Tennessee and Georgia. In analyzing all of the facts of the cause, the Court is of the opinion that a common law marriage was created, and the Plaintiff is, in fact, the widow of Cleo P. Payne.

When the Trial Court was requested by Defendants to provide "a more detailed finding of fact and conclusions of law as to how this marriage was created and why the deed was invalid," the Trial Court filed a second Memorandum Opinion which stated:

The Petitioners [sic] allege that Cleo P. Payne and the Plaintiff, Lois Hill Payne, were married in Tampa, Florida in 1992 [sic-1982], but their marriage license was never registered with the proper Florida authorities. This Court holds that the alleged Florida marriage never occurred. The two would buy the license, then they would go through a partying stage and never went through with the marriage; consequently, this allegation is of no validity. The next question arises as to whether a common law marriage existed that would afford Lois Hill Payne widow's rights in real estate that was owned by Cleo P. Payne, the decedent, and his sons, Donald P. Payne and Terry L. Payne. A number of year ago, money was borrowed by the sons to purchase this property for their father. It is admitted that different ones of the three made payments toward the loan.

It is first necessary to make a decision as to whether or not a common law marriage existed. At the time the events were occurring in the mid 1970's, Florida and Georgia each held that if a party held another out to be his legal spouse and they cohabited together, then a common law marriage resulted. The Court believes it was 1996 that Georgia changed its law relative to such. In the instant case, however, there was no doubt that these parties held themselves out to be husband and wife, and not only did they do so in the respective states, but their action was corroborated by the fact that they lived together on the disputed land for nearly twenty years. As a result of the facts involved in this case, the Court holds that a common law marriage existed.

***4** Although a common law marriage cannot be established by conduct within the State of Tennessee, it can be proved by a showing of the required elements in a jurisdiction where such a marriage is sanctioned. *In re Estate of Glover*, 882 S.W.2d 789, 789-90 (Tenn.Ct.App.1994). The Trial Court's comment that "they lived together on the disputed land for nearly twenty years" cannot be the basis for finding a common law marriage, since "a common law marriage cannot be established by *conduct within the State of Tennessee.*" *Id.* The Trial Court in this case was thus required to find a common law marriage existed between these parties in Florida or Georgia, if at all. No common law marriage entered into after January 1, 1968 is valid in Florida. F.S.A. § 741, 211 (Laws 1967). Plaintiff admits that the parties never resided in Georgia. Their contact with the Georgia was limited to two or three nights spent in Georgia motels while traveling through Georgia.

In Georgia, "[i]n order for a common law marriage to come into existence, the parties must be able to contract, must agree to live together as man and wife, and must consummate the agreement." *In Re: The Estate of Teresa K. Wilson*, No. A98A2230 (Ga.App., filed February 17, 1999). "When the alleged marriage is unlicensed and nonceremonial, the burden is on the proponent to prove that a common law marriage existed." *Baynes v. Baynes*, 219 Ga.App. 848, 849, 467 S.E.2d 195 (Ga.1996). Further, the Georgia Court of Appeals has recently held that:

When the relationship between the parties begins as an illicit arrangement, the burden is on the party asserting the validity of the marriage to show that the illicit relationship ended and that the parties did actually enter a marriage contract. In the case of a common law marriage, 'This may be done by ... such circumstances as the act of living together as man and wife, holding themselves out to the world as such, and repute in the vicinity and among neighbors and visitors that they are such, and indeed all such facts as usually accompany the marriage relation and indicate the factum of marriage .... Of particular import is that 'such legal relationship cannot be partial or periodic.'

Wright v. Goss, 229 Ga.App. 393, 394, 494 S.E.2d 23 (1997), *cert. denied* Feb. 20, 1998.

In the case before us, Plaintiff testified that she and Payne stayed overnight several times between 1979 and 1982 in motels in the State of Georgia, and that she saw him register them as a married couple at the motels. The testimony of the Plaintiff shows they were, at that time, still involved in an illicit relationship. This is clear from her response when asked to explain why, if she and Payne were holding themselves out as a married couple, her name was not placed on the 1982 deed to the property:

Because Mr. Payne told me he would see that I was always taken care of, that I would always have a home as long as I didn't marry someone else.

***5** This discussion between Plaintiff and Tony Payne shows the *absence* of an intent by Tony Payne to enter a marriage contract with Plaintiff as of 1982, when they moved to Tennessee. Rather, the uncontested proof is that Tony Payne wanted to provide Plaintiff "a home as long as she didn't marry someone else." Further, as mentioned earlier in this Opinion, Plaintiff and Tony Payne had on several occasions obtained a marriage license but never followed through with a marriage ceremony. As found by the Trial Court, Plaintiff and Tony Payne would buy a marriage license, go through a "partying stage" and never get married. While this is not dispostive of whether there was or was not a common law marriage under Georgia law, it is relevant to whether they held themselves out to the world as already being married.

Since the parties were still involved in an illicit relationship and had not contracted to be man and wife when they moved to Tennessee in 1982, they were not married according to Georgia common law at that time. There is no evidence that they ever resided or stayed overnight in Georgia after they moved to Tennessee in 1982. Accordingly, because Plaintiff has failed to prove "that the illicit relationship ended and that the parties did actually enter a marriage contract" *in Georgia*, we find the Plaintiff has failed to prove the existence of a common law marriage under the laws of Georgia.

As shown in the record before us, Tony Payne was of sound mind up to the time of his death. He could have taken legally enforceable steps to provide a home for Plaintiff upon his death, but he did not do so. His trust in his sons' promise to provide a home for Plaintiff, if that promise was made, apparently was misplaced.

Because we find that Plaintiff was not the com-

mon law wife of Tony Payne, we need not determine in this case whether the quitclaim deed to Defendants is valid. Plaintiff has no legally enforceable interest in the property regardless of the validity of that deed. Absent any legally enforceable interest in the property, Plaintiff has no standing to contest the validity of the quitclaim deed.

CONCLUSION

The judgment of the Trial Court is reversed and the case is remanded to the Trial Court for all appropriate purposes consistent with this Opinion and for collection of the costs below. The costs on appeal are assessed against Plaintiff.

GODDARD, P.J., and FRANKS, J., concur.

Tenn. Ct. App.,1999.
Payne v. Payne
Not Reported in S.W.3d, 1999 WL 1212435 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.3d, 2001 WL 43211 (Tenn.Ct.App.)
(Cite as: 2001 WL 43211 (Tenn.Ct.App.))

Court of Appeals of Tennessee.
Richard Eugene STONER,
v.
Mary Elizabeth STONER.

No. W2000-01230-COA-R3-CV.
Jan. 18, 2001.

Direct Appeal from the Chancery Court for Henry County, No. 17938; Ron E. Harmon, Chancellor.
Teresa McCaig Marshall, Paris, TN, for appellant, Richard Eugene Stoner.

Vicki H. Hoover, Paris, TN, for appellee, Mary Elizabeth Stoner.

FARMER, J., delivered the opinion of the court, in which LILLARD, J. and TOMLIN, Sp. J., joined.

OPINION

FARMER.

***1** This appeal arises from a divorce between a couple with a long standing pre-marital relationship. Citing this relationship, the trial court classified two stock accounts as marital property and awarded Wife a portion of their funds. These accounts were pre-marital accounts of Husband. No marital funds were deposited in the accounts by either party and Wife had no interaction with the accounts. Under the circumstances of this case, the trial court's classification of this property as marital property amounts to recognition of a common-law marriage, and Tennessee does not recognize common-law marriages. As such, the trial court was incorrect in awarding funds from the accounts to Wife. The trial court correctly assigned pre-marital debt, divided the remainder of marital property, and awarded alimony *in futuro* and attorney's fees. We affirm in part and reverse in part.

On February 14, 1997, Richard and Mary Stoner were married in Maryland after a relationship stretching back almost twenty years. They moved to Tennessee in September of that year, shortly after Mr. Stoner retired from his job with the federal government. Mrs. Stoner was not employed during this twenty year period but did receive Social Security payments.[FN1] The couple purchased a house and made the down payment using funds from Mr. Stoner's stock account. They also purchased a new car for Mr. Stoner using his premarital vehicle as a trade-in. Eventually, the couple was joined by Mrs. Stoner's son from a previous marriage, who moved in with them after a request by Mrs. Stoner.

FN1. Mrs. Stoner received Social Security before her 65th birthday due to a disability.

The marriage was not a happy one. Mrs. Stoner ran the household's finances and Mr. Stoner claimed he was given an allowance of $15 per week. Mr. and Mrs. Stoner maintained separate bedrooms and constantly argued over seating arrangements in the other rooms. Mr. Stoner testified that he was verbally abused by both his wife and her son. Eventually, after Mrs. Stoner's son claimed he was attacked by Mr. Stoner, Mrs. Stoner committed Mr. Stoner to a mental hospital for depression. After he was released, Mr. Stoner filed for divorce citing inappropriate marital conduct.

During the parties' twenty year relationship but prior to their marriage, Mrs. Stoner claimed to have placed money in a joint checking account which was used to pay for various expenses of both parties. In her

deposition, Mrs. Stoner stated she deposited her $337 Social Security check in the joint account "once or twice a year." However, at trial, Mrs. Stoner testified that she had deposited her check every month. Mr. Stoner disputed the assertion that Mrs. Stoner deposited any funds, claiming that her name was on the account because she had authority to sign checks. While Mrs. Stoner confirmed at her deposition that she only had the authority to sign checks, she testified at trial that this statement was incorrect and that the account was a joint account. Funds from this account were invested by Mr. Stoner at Legg Masons. These stocks were placed in both a stock account and a trust account. Both accounts were solely in Mr. Stoner's name and remained so throughout the couple's relationship and eventual marriage.

***2** The trial court granted the plaintiff a divorce on the grounds of inappropriate marital conduct. In its property division, the trial court cited the long term relationship of twenty years between the parties as the basis for its division. Mr. Stoner received his personal checking account, one-half of his vehicle, one-half of the marital home, one-half of the Legg Mason stock account valued at approximately $78,250 and one-half of the accumulated marital property. Mrs. Stoner received the remainder of the marital property.

Mr. Stoner was awarded $41,340 of a Legg Mason Value Trust account as pre-marital separate property. The remaining balance, representing the growth of the account's value during the marriage, was split equally between the parties. In addition, Mrs. Stoner kept her pre-marital vehicle and was awarded attorney's fees. Mr. Stoner was assigned all the debt from the marriage and ordered to pay alimony *in futuro.*

The issues presented on appeal by the appellant, as we perceive them, are as follows:

I. Did the trial court err in determining that the pre-marital relationship revealed that the parties had used joint efforts and funds to accumulate assets?

II. Did the trial court err in finding that the pre-marital relationship entitled Mrs. Stoner to approximately one-half of the value of the two Legg Mason accounts in Mr. Stoner's name?

III. Did the trial court appropriately divide the equity in the marital home?

IV. Did the court appropriately divide the marital debts?

V. Did the court appropriately divide the equity in Mr. Stoner's vehicle?

VI. Did the court properly award alimony *in futuro* after only two years of marriage?

VII. Did the trial court properly award attorney's fees to Ms. Stoner?

To the extent that these issues involve questions of fact, our review of the trial court's ruling is *de novo* with a presumption of correctness. *See* Tenn.R.App.P. 13(d). Accordingly, we may not reverse the court's factual findings unless they are contrary to the preponderance of the evidence. *See, e.g., Randolph v. Randolph,* 937 S.W.2d 815, 819 (Tenn.1996); Tenn.R.App.P. 13(d). With respect to the court's legal conclusions, however, our review is *de novo* with no presumption of correctness. *See, e.g., Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen and Ginsburg, P.A.,* 986 S.W.2d 550, 554 (Tenn.1999); Tenn.R.App.P. 13(d).

Pre-Marital Relationship

The trial court in this case found that the "parties ha[d] ... long term relations extending back some twenty (20) or more years; that during that time these parties used joint efforts and joint funds in accumu-

lating assets of both parties. That Mrs. Stoner, while not accumulating in her own name, contributed significantly to the accumulation of the parties' assets by her domestic assistance and companionship and that these parties held themselves out to be, and in fact, accumulated as if they were husband and wife.... [T]his long standing partnership gave rise to the Court's allowing Mrs. Stoner a portion of the assets." This finding by the trial court resulted in Mrs. Stoner receiving one-half of the Legg Mason stock account valued at $78,250. In addition, the trial court found that the Legg Mason Value Trust account had experienced significant growth since the date of the marriage. The court awarded Mr. Stoner $41,340 as separate pre-marital property and split the account's growth during the marriage equally, resulting in Mrs. Stoner receiving $28,515.

***3** "It is settled law in Tennessee that though a common law marriage cannot be contracted within this State, our courts do recognize a common law marriage contracted in a state where such a marriage is valid." *Lightsey v. Lightsey*, 407 S.W.2d 684, 690 (Tenn.Ct.App.1966). As the entire pre-marital relationship of the parties involved in this action took place in Maryland, it is thus necessary to examine Maryland law. Our examination of Maryland law discovers that its views on common law marriage parallels Tennessee law in many respects.

> Maryland has continuously held that a common-law marriage, valid where contracted, is recognized in this State. Absent a showing that the "marriage" was valid where performed, no amount of holding out as husband and wife, reputation as being husband and wife, number of children, or any other factor will transpose the living together of a man and woman into a legal marriage in this State.

Goldin v. Goldin, 426 A.2d 410, 412 (Md.Ct.Spec.App.1981).

The trial court's findings in this matter are clearly erroneous under Tennessee law. The court's findings show that it used the parties' pre-marital actions as a basis for the property division of the assets held by the parties. The court found that Mrs. Stoner had contributed "significantly to the accumulation of the parties' assets by her domestic assistance and companionship." In addition, the court cited the fact that these assets had been accumulated while the parties held themselves out to be husband and wife. As we have already stated, neither Tennessee nor Maryland recognize common law marriage. As such, the trial court in essence recognized a common-law marriage between the Stoners, and the trial court erred in dividing the pre-marital assets of Mr. Stoner on this basis.[FN2]

> FN2. We do not suggest that there cannot be reasons for dividing pre-marital assets in a related situation. For example, if the parties had, in addition to maintaining a pre-marital relationship, run a business together, a court could find that a business partnership existed between the parties. *See Bass v. Bass*, 814 S.W.2d 38 (Tenn.1991). We note, however, that such a finding would most likely *not* be based in the law of domestic relations but in some other area of law such as business partnership law.

Division of Pre-Marital Assets

As stated above, the trial court incorrectly determined that the pre-marital actions of the parties in this case should be determinative in the allocation of assets upon the divorce of the parties. As such, it is necessary to correct this error. This court finds that Mr. Stoner should have been awarded the entire balance of the Legg Mason stock account as separate property and the trial court's order is modified accordingly.

The trial court also determined that a portion of the Legg Mason Value Trust was marital property. This account, like the Legg Mason stock account, was

a pre-marital asset solely in Mr. Stoner's name. It remained so throughout the marriage. The court determined that the increase in value that this Trust experienced during the marriage should be divided as marital property. However, Tennessee Code Annotated section 36-4-121(b)(1)(B) states that " '[m]arital property' includes income from, and any increase in value during the marriage of, property determined to be separate property ... if each party *substantially contributed* to its preservation and appreciation ... during the period of the marriage." Tenn.Code Ann. 36-4-121(b)(1)(B) (Supp.2000) (emphasis added).

***4** The testimony of Mrs. Stoner during the trial made it clear that she had not "substantially contributed" to the increase in the value of this account.

> Q. How many times have you contacted the broker regarding this stock, Ms. Stoner?
>
> A. I have never contacted-I let [Mr. Stoner] do everything and I trusted him and he always told me what was going on.
>
> ....
>
> Q. But you've never had any active participation in the stocks, have you?
>
> A. No. I never requested to do so. Dick handled it and I trusted him to do what was right with it.

Mrs. Stoner's lack of "substantial contribution" was reinforced by Mr. Stoner's testimony.

> Q. Mr. Stoner, the stock that we've been talking about today, is that your premarital stock?
>
> A. It is. I owned all that stock prior to the marriage.
>
> Q. When did you first have that stock?
>
> A. I was just talking to my broker today and he said I'd been up there about 20 years.
>
> Q. Do you recall the last time you actually contributed any finances to the stock yourself?
>
> A. I haven't since I got married.
>
> ....
>
> Q. Before that, did you do anything yourself with the stock except just let your broker handle it?
>
> A. Mostly my broker, on his advise I bought and sold.
>
> ....
>
> Q. Did [Mrs. Stoner] assist you in any way handling the stock?
>
> A. No way.

It is thus clear that Mrs. Stoner did not "substantially contribute" to the increase in Mr. Stoner's premarital Legg Mason Value Trust account. Therefore, the increase in value of this account during the marriage is not marital property. Instead, it is the separate property of Mr. Stoner. Thus, we find that the entire amount of the Legg Mason Value Trust, approximately $98,000, should have been awarded as separate property to Mr. Stoner, and the trial court's order is modified accordingly.

Marital Home

Subsequent to the filing of this appeal, an order was entered in the trial court stating that the parties had agreed that Mr. Stoner would purchase Mrs. Stoner's interest in the marital residence for the sum of $16,676.03. As this action was taken upon the agreement of the parties, we hereby find that this issue

has been waived on appeal.

Marital Debts

"Courts should apportion marital debts equitably in much the same way that they divide marital assets." *Mondelli v. Howard,* 780 S.W.2d 769, 773 (Tenn.Ct.App.1989). As such, it is necessary to examine the relevant statute concerning the apportionment of marital assets to determine if the trial court properly assigned the marital debts of the parties. That statute states:

> In making equitable division of marital property, the court shall consider all relevant factors including:
>
> (1) The duration of the marriage;
>
> (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
>
> (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
>
> ***5** (4) The relative ability of each party for future acquisitions of capital assets and income;
>
> (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
>
> (6) The value of the separate property of each party;
>
> (7) The estate of each party at the time of the marriage;
>
> (8) The economic circumstances of each party at the time the division of property is to become effective;
>
> (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
>
> (10) The amount of social security benefits available to each spouse; and
>
> (11) Such other factors as are necessary to consider the equities between the parties.
>
> Tenn.Code Ann. § 36-4-121(c) (Supp.2000).

While examining the trial court's division of marital debts in light of the statute above, we must be cognizant that

> [t]rial courts have wide latitude in allocating debt, and appellate courts are hesitant to second-guess their decisions as long as the debt has been properly classified and then divided in a fair and equitable manner. Determining whether debt has been divided fairly and equitably requires appellate courts to consider the trial court's allocation of the debt in light of the division of property and the provision, if any, for spousal support.
>
> *Mansfield v. Mansfield,* No. 01A019412CH0058, 1995 WL 643329, at *9 (Tenn.Ct.App. Nov. 3, 1995).

In our review of the record in this case, we feel that the trial court classified and divided the debt of the parties in a "fair and equitable manner." *Id.* The

court properly allocated the debt using the factors listed in Tennessee Code Annotated section 36-4-121(c). Indeed, our previous determination that Mrs. Stoner was not entitled to any funds from Mr. Stoner's Legg Mason accounts reinforces this allocation. We hereby affirm the trial court's order assigning the entire amount of the marital debt to Mr. Stoner.

Equity in Mr. Stoner's Vehicle

> "Marital property" means all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing or up to the date of the legal separation hearing unless equity would require another valuation date and owned by either or both spouses as of the date of filing of a complaint for divorce or complaint for legal separation, except in the case of fraudulent conveyance in anticipation of filing, and including any property to which a right was acquired up to the date of the final divorce hearing, or the date of legal separation hearing unless equity would require another valuation date, and valued as of a date as near as reasonably possible to the final divorce hearing date or the date of the legal separation hearing....
> ***6** Tenn.Code Ann. § 36-4-121(b)(1)(A) (Supp.2000).

Upon a review of the record, we take notice that Mr. Stoner has acknowledged that his vehicle is marital property. As such, he does not claim that his vehicle is improperly classified as marital property. Instead, he claims that it was unfair that he did not receive a larger portion of the vehicle's worth. Mr. Stoner argues that he should receive credit for the value of his pre-marital vehicle that was traded-in to purchase the new vehicle.

As "the trial court is granted broad discretion in adjusting and adjudicating the parties' interest in all jointly owned property.... Its decision regarding division of the marital property is entitled to great weight on appeal." *Watters v. Watters*, 959 S.W.2d 585, 590 (Tenn.Ct.App.1997). Upon reviewing the record, we find that the trial court did not abuse its discretion in this area of the property division. As such, we affirm the trial court's ruling in respect to the division of Mr. Stoner's vehicle.

Alimony Award

"The trial court has broad discretion concerning the amount and duration of spousal support. Its decision is factually driven and requires a balancing of factors." *Watters*, 959 S.W.2d at 593. The factors, as set forth under Tennessee statute, are as follows:

> (A) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
>
> (B) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;
>
> (C) The duration of the marriage;
>
> (D) The age and mental condition of each party;
>
> (E) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
>
> (F) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;
>
> (G) The separate assets of each party, both real and personal, tangible and intangible;

(H) The provisions made with regard to the marital property as defined in § 36-4-121;

(I) The standard of living of the parties established during the marriage;

(J) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;

(K) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and

(L) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn.Code Ann. § 36-5-101(d) (Supp.2000).

***7** In the past, this court has determined that "[t]he most significant factors are need and the ability to pay." *Watters*, 959 S.W.2d at 593. Examining all of the factors set forth under the statute and giving due weight to the most significant, we find that the trial court did not incorrectly determine the amount and type of support for Mrs. Stoner. It is clear that Mrs. Stoner, due to her age and medical problems, has a great need for alimony *in futuro*. It is equally clear that Mr. Stoner has the ability to pay the amount awarded by the court. As such, we affirm the trial court's award of alimony *in futuro* to Mrs. Stoner.

Attorney's Fees

"The award of legal expenses is appropriate when the spouse seeking them lacks sufficient funds to pay her expenses or would be required to deplete her resources." *Watters*, 959 S.W.2d at 594. In this case, Mrs. Stoner was awarded attorney's fees by the trial court. We take notice that the trial court thought such an award appropriate even after the division of marital property and the award of alimony *in futuro*. We feel that such an award is even more proper given on modification of the trial court's award of the Legg Mason accounts.[FN3] Therefore, we hereby affirm the trial court's award of attorney's fees to Mrs. Stoner.

FN3. The Appellant has also recognized that Mrs. Stoner would be unable to pay her attorney's fees if the court ruled in his favor on this issue. The recognition by the Appellant that it would be equitable to pay such fees is to be commended.

Conclusion

Based on the foregoing conclusions, the trial court's order awarding Mrs. Stoner part of the value of the Legg Mason accounts is hereby reversed. The trial court's decisions on all other matters are affirmed. Costs on appeal are assessed against the appellant, Richard Eugene Stoner, and his surety, for which execution may issue if necessary.

Tenn.Ct.App.,2001.
Stoner v. Stoner
Not Reported in S.W.3d, 2001 WL 43211 (Tenn.Ct.App.)

END OF DOCUMENT

--- F.Supp.2d ----, 2014 WL 997525 (M.D.Tenn.)
(Cite as: 2014 WL 997525 (M.D.Tenn.))

H

Only the Westlaw citation is currently available.

United States District Court,
M.D. Tennessee,
Nashville Division.
Valeria TANCO and Sophie Jesty, Ijpe DeKoe and Thomas Kostura, and Johno Espejo and Matthew Mansell, Plaintiffs,
v.
William Edward "Bill" HASLAM, as Governor of the State of Tennessee, in his official capacity; Larry Martin, as Commissioner of the Department of Finance and Administration, in his official capacity, and Robert Cooper, as Attorney General & Reporter of the State of Tennessee, in his official capacity, Defendants.

Case No. 3:13–cv–01159.
Filed March 14, 2014.

Background: Married, same-sex couples who lived and were legally married in other states before moving to Tennessee brought action against Tennessee officials, challenging constitutionality of Tennessee's anti–recognition laws, which voided and rendered unenforceable in Tennessee any marriage prohibited in the state. Couples moved for preliminary injunction to prohibit officials from enforcing the anti–recognition laws against them.

Holdings: The District Court, Aleta A. Trauger, J., held that:
(1) couples' cause of action accrued, and Tennessee's one-year statute of limitations began to run, each day their constitutional rights were allegedly violated;
(2) couples had likelihood of success on merits of their claim that the anti–recognition laws violated their constitutional rights;
(3) couples would likely suffer irreparable harm absent the injunction;
(4) balance of hardships favored issuance of the injunction; and
(5) public interest supported grant of the injunction.

Motion granted.

West Headnotes

[1] Injunction 212 1092

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1092 k. Grounds in General; Multiple Factors. Most Cited Cases

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest.

[2] Injunction 212 1033

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(B) Factors Considered in General
212k1033 k. Balancing or Weighing Factors; Sliding Scale. Most Cited Cases

The factors to be considered in assessing whether an injunction is appropriate are to be balanced and are not prerequisites that must be satisfied.

--- F.Supp.2d ----, 2014 WL 997525 (M.D.Tenn.)
(Cite as: 2014 WL 997525 (M.D.Tenn.))

[3] Limitation of Actions 241 58(1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k58 Liabilities Created by Statute
241k58(1) k. In General. Most Cited Cases

Married, same-sex couples' cause of action accrued, and Tennessee's one-year statute of limitations began to run, each day their constitutional rights were allegedly violated by Tennessee's ongoing refusal to recognize their marriages in other states pursuant to Tennessee's anti–recognition laws, which voided and rendered unenforceable in Tennessee any marriage prohibited in the state. West's T.C.A. Const. Art. 11, § 18; West's T.C.A. §§ 28–3–104(a)(3), 36–3–113.

[4] Limitation of Actions 241 165

241 Limitation of Actions
241IV Operation and Effect of Bar by Limitation
241k165 k. Operation as to Rights or Remedies in General. Most Cited Cases

The continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations.

[5] Limitation of Actions 241 58(1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k58 Liabilities Created by Statute
241k58(1) k. In General. Most Cited Cases

A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within the applicable state statute of limitations.

[6] Limitation of Actions 241 58(1)

241 Limitation of Actions
241II Computation of Period of Limitation
241II(A) Accrual of Right of Action or Defense
241k58 Liabilities Created by Statute
241k58(1) k. In General. Most Cited Cases

When a law impinges each day on a plaintiff's constitutional rights, a new limitations period begins to run each day as to that day's damage.

[7] Civil Rights 78 1762

78 Civil Rights
78V State and Local Remedies
78k1759 Injunction
78k1762 k. Other Particular Cases and Contexts. Most Cited Cases

Married, same-sex couples who lived and were legally married in other states before moving to Tennessee, seeking preliminary injunction prohibiting Tennessee officials from enforcing Tennessee's anti–recognition laws against them, so as to void their marriages and render them unenforceable in Tennessee, had substantial likelihood of success on merits of claim that Tennessee's anti–recognition laws violated their constitutional rights under the equal protection clause. U.S.C.A. Const.Amend. 14; West's T.C.A. Const. Art. 11, § 18; West's T.C.A. § 36–3–113.

[8] Civil Rights 78 1762

78 Civil Rights
78V State and Local Remedies
78k1759 Injunction
78k1762 k. Other Particular Cases and Contexts. Most Cited Cases

Married, same-sex couples who lived and were legally married in other states before moving to Tennessee would likely suffer irreparable harm by violation of their constitutional rights under the equal protection clause in absence of preliminary injunction prohibiting Tennessee officials from enforcing Tennessee's anti–recognition laws against them, so as to void their marriages and render them unenforceable in Tennessee, where state's refusal to recognize their marriages de-legitimized their relationships, degraded them in their interactions with the state, caused them to suffer public indignity, and invited public and private discrimination and stigmatization. U.S.C.A. Const.Amend. 14; West's T.C.A. Const. Art. 11, § 18; West's T.C.A. § 36–3–113.

[9] Injunction 212 1106

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1106 k. Irreparable Injury. Most Cited Cases

The loss of a constitutional right, even for a minimal period of time, unquestionably constitutes irreparable injury; thus, when reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.

[10] Civil Rights 78 1762

78 Civil Rights
78V State and Local Remedies
78k1759 Injunction
78k1762 k. Other Particular Cases and Contexts. Most Cited Cases

Balance of hardships favored preliminary injunction prohibiting Tennessee officials from enforcing Tennessee's anti–recognition laws against married, same-sex couples who lived and were legally married in other states before moving to Tennessee, so as to void their marriages and render them unenforceable in Tennessee, where the anti–recognition laws were likely to be found unconstitutional, as violating couples' equal protection rights, and Tennessee had no valid interest in enforcing an unconstitutional policy. U.S.C.A. Const.Amend. 14; West's T.C.A. Const. Art. 11, § 18; West's T.C.A. § 36–3–113.

[11] Injunction 212 1047

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(B) Factors Considered in General
212k1041 Injury, Hardship, Harm, or Effect
212k1047 k. Injury or Inconvenience to Defendant or Respondent. Most Cited Cases

No substantial harm can be shown in the enjoinment of an unconstitutional policy.

[12] Civil Rights 78 1762

78 Civil Rights
78V State and Local Remedies
78k1759 Injunction
78k1762 k. Other Particular Cases and Contexts. Most Cited Cases

Public interest supported grant of preliminary injunction prohibiting Tennessee officials from enforcing Tennessee's anti–recognition laws against

--- F.Supp.2d ----, 2014 WL 997525 (M.D.Tenn.)
(Cite as: 2014 WL 997525 (M.D.Tenn.))

married, same-sex couples who lived and were legally married in other states before moving to Tennessee, so as to void their marriages and render them unenforceable in Tennessee, although issuing the injunction would temporarily stay enforcement of democratically enacted laws, where the anti–recognition laws were likely unconstitutional as violating the couples' equal protection rights. U.S.C.A. Const.Amend. 14; West's T.C.A. Const. Art. 11, § 18; West's T.C.A. § 36–3–113.

[13] Injunction 212 1039

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(B) Factors Considered in General
212k1039 k. Public Interest Considerations. Most Cited Cases

Ultimately, it is always in the public interest to prevent the violation of a party's constitutional rights, and, for purposes of assessing whether an injunction is appropriate, the public interest is promoted by the robust enforcement of constitutional rights.

West Codenotes
Validity Called into DoubtWest's T.C.A. § 36–3–113.Abby Rose Rubenfeld, Rubenfeld Law Office, PC, John L. Farringer, IV, Phillip F. Cramer, Scott Hickman, William L. Harbison, Sherrard & Roe, Nashville, TN, ASAF ORR, Christopher F. Stoll, Shannon P. Minter, San Francisco, CA, Maureen T. Holland, Holland & Associates, PLLC, Memphis, TN, Regina M. Lambert, Law Office of Regina M. Lambert, Knoxville, TN, for Plaintiffs.

Martha A. Campbell, Kevin Gene Steiling, Tennessee Attorney General's Office, Nashville, TN, for Defendants.

MEMORANDUM

ALETA A. TRAUGER, District Judge.

***1** Before the court is the plaintiffs' Motion for Preliminary Injunction (Docket No. 29), to which the defendants filed a Response in opposition (Docket No. 35) and the Family Action Council of Tennessee ("FACT") filed an *amicus brief* in opposition (Docket No. 43), and the plaintiffs filed a Reply (Docket No. 46) and several Notices of Filing of Supplementary Authority (Docket Nos. 48, 55, 56, and 58). For the reasons stated herein, the motion will be granted.

OVERVIEW

The plaintiffs are three married, same-sex couples who lived and were legally married in other states before moving to Tennessee.[FN1] Tennessee does not recognize their marriages for one reason only: they do not reflect a union between "one man and one woman." *See* Tenn. Const. Art. XI, § 18; Tenn.Code Ann. § 36–3–113 (collectively, the "Anti–Recognition Laws"). [FN2] The plaintiffs challenge the constitutionality of the Anti–Recognition Laws.[FN3] Pending a final decision on the merits of their claims, the plaintiffs seek a preliminary injunction that would prevent the defendants from enforcing the Anti–Recognition Laws against them.

At the outset, given the sensitivity of the issues presented, the court emphasizes the narrowness of the decision it is issuing today.

First, the nature of a preliminary injunction remedy is just that—preliminary. It is not a final judgment on the merits of a case. Instead, it *preliminarily* enjoins a party (here, effectively, the State of Tennessee) from engaging in a particular action until the court can rule on the merits of the plaintiffs' claims at a later stage, typically with the benefit of more evidence and legal authority. In making its decision, the court must decide, among other things, whether the plaintiffs are *likely* to prevail on the merits of their claims, not that they have prevailed or that they necessarily will prevail on their claims. In other words, the court's decision today simply reflects its best pro-

jection, based on the evidence and the existing state of the law, as to whether the plaintiffs are *likely* to win their case. Currently, all relevant federal authority indicates that the plaintiffs in this case are indeed likely to prevail on their claims that the Anti–Recognition Laws are unconstitutional. That said, by the time that this court is asked to render a final judgment, it may be that other federal courts will have reached a different interpretation that favors the defendants' position. By the same token, it may be that federal courts will continue uniformly to strike down anti-recognition laws, state same-sex marriage bans, and other laws that discriminate based on sexual orientation. The impact of future decisions, which are forthcoming as the result of continuing litigation in other federal trial and appellate courts across the country, will inevitably influence the ultimate disposition of this case.

Second, the plaintiffs have *not* directly challenged Tennessee's refusal to permit same-sex marriages from being consummated in Tennessee. Instead, the plaintiffs challenge only Tennessee's refusal to recognize marriages legally consummated by same-sex couples in other states, such as a same-sex couple that weds in New York (a state that permits same-sex marriage) before moving to Tennessee.

***2** Third, even with respect to the Anti–Recognition Laws, the plaintiffs seek temporary relief *only as to the six specific plaintiffs (three couples) remaining in this lawsuit.* They do not seek class relief in their Complaint or in their request for a preliminary injunction.

As explained in this opinion, the plaintiffs have persuaded the court to enjoin enforcement of the Anti–Recognition Laws against them, pending a final decision on the merits. The court's order only means that, at least for the time being, Tennessee will not be able to enforce the Anti–Recognition Laws against six people (three same-sex couples) until the court renders a final judgment in the case. Thus, even after today, Tennessee's ban on the consummation of same-sex marriages within Tennessee remains in place, and Tennessee may continue to refuse to recognize same-sex marriages consummated in other states, *except* as to the six plaintiffs in this case. The court's opinion should not be construed in any other way.[FN4]

THE PLAINTIFFS

The plaintiffs in this case have filed unrebutted affidavits that describe their personal backgrounds, how they met their respective spouses, when and why they moved to Tennessee, and the harm that they have suffered, or may suffer, from Tennessee's enforcement of the Anti–Recognition Laws. The court will summarize the circumstances of each couple briefly.

I. *Dr. Valeria Tanco and Dr. Sophia Jesty*

Valeria Tanco and Sophia Jesty are both professors at the University of Tennessee College of Veterinary Medicine. They met in 2009 at the College of Veterinary Medicine at Cornell University in Ithaca, New York, fell in love in 2010, and legally married each other in New York on September 9, 2011. After spending a year living apart, they sought to find work as professors in the same geographic area. When the University of Tennessee's College of Veterinary Medicine offered positions to both of them, they accepted the offers and began residing together in Knoxville, Tennessee.

In addition to certain alleged injuries common to all plaintiffs, Dr. Tanco and Dr. Jesty have several special concerns. First, they purchased a house together, but, because Tennessee law may treat them as strangers rather than as a married couple, they are not assured of the same property protections in their home as a heterosexual married couple. Second, the University of Tennessee health insurance system will not permit them to combine their respective individual health insurance plans into a family plan, because UT's insurance plan incorporates the Anti–Recognition Laws. Third, in the summer of 2013, Dr. Tanco became pregnant through artificial insem-

ination, and her due date is March 21, 2014.[FN5] Under the existing state of the law in Tennessee, upon the birth of their child, Dr. Jesty will not be recognized as the child's parent, and many of the legal rights that would otherwise attach to the birth of a child (artificially inseminated or otherwise) will not apply to Dr. Jesty or to the child. These include the child's right to Social Security benefits as a surviving child if Dr. Jesty should die, the right for Dr. Jesty to visit her child at a hospital if Dr. Tanco is unable to give consent to her presence at the time the baby is born, and the right of Dr. Jesty to make medical decisions regarding the medical care provided to their baby in the event that Dr. Tanco is unable to make those decisions. Fourth, and finally, they are concerned about the environment in which their child will be raised, fearing that Tennessee's refusal to recognize her parents' marriage will stigmatize her, cause her to believe that she and her family are entitled to less dignity than her peers and their families, and give her the impression that her parents' love and their family unit is somehow less stable.

II. *Sergeant Ijpe DeKoe & Mr. Thomas Kostura*

***3** Ijpe DeKoe is a Sergeant First Class in the United States Army Reserves. He resides and is stationed in Memphis, Tennessee. Thomas Kostura is a graduate student at the Memphis College of Fine Arts. In March 2011, Sgt. DeKoe began dating Mr. Kostura, who was a New York resident at the time. They fell in love that year. At some point before August 2011, Sgt. DeKoe was transferred to Fort Dix in New Jersey in preparation for deployment to Afghanistan. On August 4, 2011, before Sgt. DeKoe was deployed, he and Mr. Kostura legally married in New York. In May 2012, after Sgt. DeKoe returned from his deployment to Afghanistan, he and Mr. Kostura moved to Memphis, where was DeKoe was again stationed.

On September 3, 2013, the United States Department of Defense began recognizing Sgt. DeKoe and Mr. Kostura's marriage. Although the military recognizes Sgt. DeKoe's marriage to Mr. Kostura, Tennessee does not. Sgt. DeKoe avers that, "[a]s someone who has dedicated my career and risked my life to protect American values of freedom, liberty, and equality, it is particularly painful to return home after serving in Afghanistan only to have my citizenship diminished by Tennessee's refusal to recognize our marriage."

III. *Johno Espejo & Matthew Mansell*

Johno Espejo met Matthew Mansell in approximately 1995 in San Francisco, California. They began dating and have been in a committed relationship since that time. While living in Alameda, California, they decided to start a family together by adopting children from the Alameda foster care system. In December 2007, the foster agency placed a thirteen-month old boy in their home. Approximately five months later, in 2008, the agency placed a newborn girl in their home. On August 5, 2008, Mr. Espejo and Mr. Mansell legally married each other in California. On September 25, 2009, Mr. Espejo and Mr. Mansell legally adopted the two foster children. Mr. Espejo gave up his job as a forklift driver to be a stay-at-home parent for their children.

Approximately four years ago, Mr. Mansell began working at a large international law firm in San Francisco, California, conducting conflict-of-interest checks. In 2012, the law firm announced that it would be centralizing and relocating its administrative services, including Mr. Mansell's department, to a new office located in Nashville, Tennessee. In May 2012, Mr. Espejo and Mr. Mansell moved to Franklin, Tennessee, so that Mansell could continue working for the law firm. Mr. Espejo took a part-time job at his local YMCA, which allowed him to balance his duties as a stay-at-home parent with his job.

Similar to the fears that Dr. Tanco and Dr. Jesty harbor for the child they are expecting, Mr. Espejo and Mr. Mansell are concerned about the impact of Tennessee's Anti–Recognition laws on their children.

IV. *Common Statements*

The plaintiffs' declarations contain statements about their experiences, hopes, and fears. Each couple married for several reasons, including their commitment to love and support one another, to demonstrate their mutual commitment to their family, friends, and colleagues, and to show others that they should be treated as a family. They also married to make a legally binding mutual commitment, to join their resources together in a legal unit, and to be treated by others as a legal family unit, rather than as legally unrelated individuals. Finally, each couple married so that they could access the legal responsibilities of marriage to protect themselves and their families, just as heterosexual couples do.

***4** The plaintiffs agree that they have been warmly welcomed by many Tennesseans, including their neighbors and colleagues. However, each couple is aware that Tennessee does not afford them the same rights as opposite-sex married couples and that the state government does not treat their relationship with the same dignity and respect as opposite-sex married couples. Because Tennessee law does not extend them certain rights of marriage, including certain protections in times of crisis, emergency, or death, they are denied the security and peace of mind that those protections provide to other families. Although they acknowledge that they can take additional steps to reduce some of these uncertainties—such as executing powers of attorney, wills, and other probate documents—they aver that these steps would be costly and time-consuming, that opposite-sex married couples would not need to take these measures, and that they would result in only minimal legal protections relative to the full panoply of rights that otherwise attach to state-sanctioned marriage.

The couples have also described how Tennessee's refusal to recognize their marriages causes them dignitary and reputational harm. When they interact with Tennessee officials or fill out official forms to identify themselves as married, they brace themselves for degrading experiences that often occur because of Tennessee's refusal to recognize their marriages. They regard these experiences as insulting to their personal dignity, insulting to their family's dignity, and demeaning to their relationships.

The plaintiffs also state that, by treating their marriages as if they did not exist, the state of Tennessee encourages private citizens to deny their marriages and exposes them to discrimination in their daily lives.

Finally, the plaintiffs aver as follows:

> Every day that Tennessee refuses to respect our marriage is a day that our family must suffer the indignity, stress, and stigma of not knowing whether or when our marriage will be recognized. Unlike opposite-sex couples who have the security of knowing that their marriage will be universally respected by the state and by private actors, Tennessee's constitutional and statutory denial of recognition to our marriage means that whatever recognition our marriage may receive is only by the forbearance and good graces of private actors.

V. *This Lawsuit and the Preliminary Injunction Motion*

On October 23, 2013, the plaintiffs filed this lawsuit, which challenges the constitutionality of the Anti–Recognition Laws.

On November 29, 2013, the plaintiffs moved to enjoin enforcement of the Anti–Recognition Laws against them, arguing that the Anti–Recognition Laws violate their rights under the United States Constitution to due process, interstate travel, and equal protection.[FN6] The government opposes the motion, contending that the claims are untimely, that the plaintiffs are not likely to succeed on the merits of their claims, that the plaintiffs will suffer no irreparable harm in the

absence of a preliminary injunction, that the balance of harms favors the government, and that the public interest would be best served by denying the motion.[FN7]

PRELIMINARY INJUNCTION STANDARD

***5** [1][2] Under Fed.R.Civ.P. 65, the court may issue a preliminary injunction under appropriate circumstances. In assessing whether an injunction is appropriate, the court applies the following standard:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest.

Obama for Am. v. Husted, 697 F.3d 423, 428 (6th Cir.2012) (citing *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). "These four considerations are 'factors to be balanced and not prerequisites that must be satisfied.' " *Nat'l Viatical, Inc. v. Universal Settlements Int'l, Inc.,* 716 F.3d 952 (6th Cir.2013) (citing *Am. Imaging Servs., Inc. v. Eagle–Picher Indus., Inc.,* 963 F.2d 855, 859 (6th Cir.1992)); *Performance Unlimited v. Questar Pubs., Inc.,* 52 F.3d 1373, 1381 (6th Cir.1995).

ANALYSIS

I. *Likelihood of Success on the Merits*

A. Statute of Limitations

[3] The parties agree that Tennessee's one-year statute of limitations governs the plaintiffs' claims. *See* Tenn.Code Ann. § 28–3–104(a)(3); *Hughes v. Vanderbilt Univ.,* 215 F.3d 543, 547 (6th Cir.2000). The defendants argue that the one-year statute of limitations bars the plaintiffs' claims.

[4][5][6] The "continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations." *Kuhnle Bros., Inc. v. Cnty. of Geauga,* 103 F.3d 516, 522 (6th Cir.1997). "A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within" the applicable state statute of limitations. *Id.* Where, as here, a law impinges each day on a plaintiff's constitutional rights, a new limitations period begins to run "each day as to that day's damage." *Id.* Here, the plaintiffs have each alleged various ongoing harms resulting from Tennessee's refusal to recognize their marriages, including dignitary harms and reputational harms, as well as daily concerns related to parentage, medical care, insurance, property ownership, and the like. These injuries occurred within a year of filing suit and, for the reasons explained in the next section, likely reflect ongoing deprivations of their constitutional rights. Therefore, the court finds that the statute of limitations does not bar the plaintiffs' claims.

B. Alleged Deprivation of Constitutional Rights

[7] The parties vigorously dispute whether Tennessee's Anti–Recognition Laws violate the plaintiffs' constitutional rights. The plaintiffs, the defendants, and FACT (as *amicus curiae*) have thoroughly and cogently briefed their respective positions concerning the complex, sensitive, and important legal issues presented by this case.

In *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), the Supreme Court struck down a provision of the federal Defense of Marriage Act and held that the federal government cannot refuse to recognize valid marriages in states that recognize same-sex marriage. Since the Supreme Court issued *Windsor,* numerous federal courts, including courts within the Sixth Circuit, have addressed the impact of *Windsor* on state laws relating to same-sex couples and sexual orientation. These courts have uniformly rejected a narrow reading of *Windsor*—such as that advanced by the defendants

here—and have found that *Windsor* protects the rights of same-sex couples in various contexts, notwithstanding earlier Supreme Court and circuit court precedent that arguably suggested otherwise.[FN8] These cases include decisions both inside and outside of this circuit, finding that similar state anti-recognition laws are or likely are unconstitutional (*Bourke*, *Obergefell I* and *II*, and *De Leon*), decisions granting a preliminary injunction under similar circumstances (*De Leon*, *Bostic*), and decisions finding that same-sex marriage bans are unconstitutional in the first place (*De Leon*, *Kitchen*, *Bostic*, and *Lee*).[FN9] In these thorough and well-reasoned cases, courts have found that same-sex marriage bans and/or anti-recognition laws are unconstitutional because they violate the Equal Protection Clause and/or the Due Process Clause, even under "rational basis" review, which is the least demanding form of constitutional review.

***6** In light of this rising tide of persuasive post-*Windsor* federal caselaw, it is no leap to conclude that the plaintiffs here are likely to succeed in their challenge to Tennessee's Anti–Recognition Laws. With respect to the plaintiffs' Equal Protection Clause challenge, the defendants offer arguments that other federal courts have already considered and have consistently rejected, such as the argument that notions of federalism permit Tennessee to discriminate against same-sex marriages consummated in other states, that *Windsor* does not bind the states the same way that it binds the federal government, and that Anti–Recognition Laws have a rational basis because they further a state's interest in procreation, which is essentially the only "rational basis" advanced by the defendants here.[FN10]

In particular, at this stage, the court finds Judge Heyburn's equal protection analysis in *Bourke*, which involved an analogous Kentucky anti-recognition law, to be especially persuasive with respect to the plaintiffs' likelihood of success on the merits of their Equal Protection Clause challenge in this case. There, the court analyzed the lineage of Supreme Court and Sixth Circuit precedent on the issue of marriage generally and same-sex marriage specifically, the animating principles in *Windsor*, and the relationship between discriminatory state marriage laws and the United States Constitution's guarantees, to which any state law is subordinate. *See* —— F.Supp.2d at ——– – ——–, 2014 WL 556729, at *3–12. Although that court strongly suspected that discrimination based on sexual orientation might warrant heightened scrutiny, it nevertheless subjected the anti-recognition law to a "rational basis" test under the Equal Protection Clause, found that none of the offered justifications satisfied rational basis review, and held that the anti-recognition law was unconstitutional. *Id.* In a final section, the court explained how its decision was consistent with constitutional values and requirements, was respectful of individual faith, was consistent with the public's desire to maintain the sanctity of marriage, fostered equality under the law, protected minority rights, and was the natural result of a long but steady progression in Supreme Court jurisprudence from *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) through *Windsor* in 2013. *Id.* at ——– – ——–, 2014 WL 556729 at *9–12.

The anti-recognition laws at issue here and in other cases are substantially similar and are subject to the same constitutional framework. The defendants have not persuaded the court that Tennessee's Anti–Recognition Laws will likely suffer a different fate than the anti-recognition laws struck down and/or enjoined in *Bourke*, *Obergefell*, and *De Leon*.

Accordingly, the court finds that the plaintiffs are likely to succeed on the merits of their equal protection challenge, even under a "rational basis" standard of review. For this reason, the court need not address at this stage whether sexual orientation discrimination merits a heightened standard of constitutional review or whether the plaintiffs are likely to prevail on their additional due process and right to travel challenges.

II. *Remaining Rule 65 Factors*

A. Irreparable Harm

***7** [8][9] The loss of a constitutional right, "even for a minimal period[ ] of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Thus, "when reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.2001). [FN11] Because the court has found that the plaintiffs are likely to prevail on their claims that the Anti–Recognition Laws are unconstitutional, it axiomatic that the continued enforcement of those laws will cause them to suffer irreparable harm.

Moreover, the evidence shows that the plaintiffs are suffering dignitary and practical harms that cannot be resolved through monetary relief. The state's refusal to recognize the plaintiffs' marriages de-legitimizes their relationships, degrades them in their interactions with the state, causes them to suffer public indignity, and invites public and private discrimination and stigmatization. For example, Sergeant DeKoe, who served nearly a year abroad in defense of the United States, is considered married while on military property in Memphis but unmarried off of it, which he understandably finds painful, demeaning, and diminishing. These are harms against which the Constitution protects. *See Windsor*, 133 S.Ct. at 2695–96.

Also, relative to opposite-sex couples, the plaintiffs are deprived of some state law protections, or at least the certainty that the same rights afforded to heterosexual marriages will be afforded to them. For example, they have no assurance that Tennessee will recognize their ownership of a home as tenants by the entirety, rather than as "strangers" with divisible interests. To the extent that plaintiffs could secure some of these rights by contract, they will be unfairly forced to engage in time-consuming and expensive measures to secure them, and even then only with respect to a subset of marriage rights.

For Dr. Jesty and Dr. Tanco, and for Mr. Espejo and Mr. Mansell, there is also an imminent risk of potential harm to their children during their developing years from the stigmatization and denigration of their family relationship. The circumstances of Dr. Jesty and Dr. Tanco are particularly compelling: their baby is due any day, and any complications or medical emergencies associated with the baby's birth—particularly one incapacitating Dr. Tanco—might require Dr. Jesty to make medical decisions for Dr. Tanco or their child. Furthermore, if Dr. Jesty were to die, it appears that her child would not be entitled to Social Security benefits as a surviving child. Finally, Dr. Tanco reasonably fears that Dr. Jesty will not be permitted to see the baby in the hospital if Dr. Tanco is otherwise unable to give consent.[FN12]

For all of these reasons, the court finds that the plaintiffs have shown that they will suffer irreparable harm from enforcement of the Anti–Recognition Laws. *See Obergefell I*, 2013 WL 3814262, at *6–7; *De Leon*, —— F.Supp.2d at —— – ——, 2014 WL 715741, at *24–25.

B. Balance of the Equities

***8** [10][11] "[N]o substantial harm can be shown in the enjoinment of an unconstitutional policy." *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 436 (6th Cir.2004); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 274 F.3d 377, 400 (6th Cir.2001). Here, because the court has found that the Anti–Recognition Laws are likely to be found unconstitutional, the balance of the equities necessarily favors the plaintiffs. Tennessee has no valid interest in enforcing an unconstitutional policy. Furthermore, the administrative burden on Tennessee from preliminarily recognizing the marriages of the three couples in

this case would be negligible. Therefore, the court finds that the balance of the equities favors issuance of a preliminary injunction.[FN13]

C. Public Interest

[12] The defendants argue that granting an injunction would "override by judicial fiat the results of Tennessee's valid democratic process establishing the public policy of this state," "cause harm to Tennessee in the form of an affront to its sovereignty," and "create the impression that Tennessee's public policy is subservient to that of other States." (Defs.' Mem. at pp. 25–26.) As the defendants point out, Tennessee overwhelmingly passed the constitutional amendment at issue with approximately 80% support in 2006.

[13] Although the defendants are correct that issuing an injunction will temporarily stay the enforcement of democratically enacted laws, that is essentially the case with any federal decision that overturns or stays enforcement of a state law that violates the federal Constitution. Ultimately, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir.1994). Thus, "[t]he public interest is promoted by the robust enforcement of constitutional rights." *Am. Freedom Def. Initiative v. Suburban Mobility Authority for Reg'l Transp.,* 698 F.3d 885, 896 (6th Cir.2012); *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati,* 822 F.2d 1390, 1400 (6th Cir.1987) ("[T]he public is certainly interested in the prevention of enforcement of ordinances which may be unconstitutional."); *Chabad,* 363 F.3d at 436 ("[T]he public interest is served by preventing the violation of constitutional rights."); *see also Obergefell I,* 2013 WL 3814262, at *7; *De Leon,* ––– F.Supp.2d at ––––– – ––––, 2014 WL 715741, at *26–27. Applying that principle here, the court finds that issuing an injunction would serve the public interest because the Anti–Recognition Laws are likely unconstitutional.

III. *Summary*

In determining whether a preliminary injunction is warranted, the court's obligation is to balance the four Rule 65 factors. Here, all four factors favor the plaintiffs, and little balancing need be done. Therefore, the court will issue a preliminary injunction that bars enforcement of the Anti–Recognition Laws against the plaintiffs. The injunction will remain in force until the court renders judgment on the merits of the plaintiffs' claims at a later stage in this case. Again, the court emphasizes the narrow nature of its holding today: the court's order temporarily enjoins enforcement of the Anti–Recognition Laws only as to the six plaintiffs in this case. The court is not directly holding that Tennessee's Anti–Recognition Laws are necessarily unconstitutional or that Tennessee's ban on the consummation of same-sex marriages within Tennessee is unconstitutional.

***9** At some point in the future, likely with the benefit of additional precedent from circuit courts and, perhaps, the Supreme Court, the court will be asked to make a final ruling on the plaintiffs' claims. At this point, all signs indicate that, in the eyes of the United States Constitution, the plaintiffs' marriages will be placed on an equal footing with those of heterosexual couples and that proscriptions against same-sex marriage will soon become a footnote in the annals of American history.

CONCLUSION

For the reasons stated herein, the plaintiffs' Motion for Preliminary Injunction will be granted, and the court will issue an injunction against the defendants, prohibiting them from enforcing the Anti–Recognition Laws against the six plaintiffs in this case.

An appropriate order will enter.

FN1. This lawsuit was originally filed by four same-sex couples. On March 10, 2014,

the parties stipulated to the dismissal of one of the couples (Kellie Miller and Vanessa DeVillez) and defendant Bill Gibbons, Commissioner of the Department of Safety and Homeland Security. (Docket No. 59.) The remaining plaintiffs are Valeria Tanco and Sophie Jesty, Ijpe DeKoe and Thomas Kostura, and Johno Espejo and Matthew Mansell. The remaining defendants are Governor Bill Haslam, Commissioner of the Department of Finance and Administration Larry Martin, and Attorney General Robert Cooper.

FN2. Tenn.Code Ann. § 36–3–113 provides that, among other things, "[i]f another state or foreign jurisdiction issues a license for persons to marry, which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state." *Id.* at 113(d). The statute further provides that "it is [ ] the public policy of this state that the historical institution and legal contract solemnizing the relationship of (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage." *Id.* at § 113(a). The Tennessee Constitution, which was amended in 2006 to incorporate the so-called "Tennessee Marriage Protection Amendment" following a popular referendum, contains essentially the same provisions.

FN3. To the extent that the court references laws in other states that similarly discriminate against same-sex marriages consummated in another state that recognizes same-sex marriage, the court will refer to those laws without capitalization as "anti-recognition laws" for ease of reference.

FN4. In *De Leon v. Perry*, —— F.Supp.2d ——, 2014 WL 715741 (W.D.Tex. Feb. 26, 2014), the parties disputed whether the district's injunction against enforcement of a similar Texas anti-recognition law applied only to the plaintiffs in that case, as opposed to all similarly situated plaintiffs statewide. In a footnote, the court found that its preliminary injunction would apply statewide. *Id.* at —— n. 7, 2014 WL 715741 at *27 n. 7. Here, the plaintiffs have not argued that their injunction should or would apply statewide; to the contrary, they have argued that the narrowness of the requested injunction justifies its issuance (*see* Docket No. 30 at p. 39 ("Any administrative burden on the State from recognizing Plaintiffs' four additional valid marriages would be negligible.")), and their request for relief is limited to the plaintiffs in this case (*see id.* at p. 40 ("Plaintiffs respectfully request that the Court issue a preliminary injunction barring Defendants and those under their supervision from enforcing the Anti–Recognition Laws *against the four plaintiff couples in this case* while this action is pending.") (emphasis added)). Because the plaintiffs have limited their request for preliminary injunctive relief in this fashion, the court expresses no opinion concerning the potential application of its ruling statewide, if these or any other potential plaintiffs were to request broader relief in the future.

FN5. In support of the plaintiffs' Motion to Ascertain Status (Docket No. 61), the plaintiffs filed a supplemental Declaration of Valeria Tanco (Docket No. 62), which, among other things, stated Dr. Tanco's due date.

FN6. In support of their motion, the plaintiffs filed a Memorandum of Law (Docket No. 30), an Appendix of cases (Docket No. 31), and a Notice containing separate declarations

from each plaintiff (Docket No. 32).

FN7. In support of their brief in opposition, the defendants filed an Appendix of legal authority (Docket No. 36) and a Notice containing the Declaration of Mark Goins, State Coordinator of Elections (Docket No. 37, Attachment No. 1), and the Affidavit of Connie Walden (*id.*, Attachment No. 2). FACT filed an *amicus* brief in support of the defendants' position. (Docket No. 43.)

FN8. *See generally Obergefell v. Kasich*, 2013 WL 3814262 (S.D.Ohio July 22, 2013) ("*Obergefell I* ") (preliminarily enjoining enforcement of Ohio anti-recognition law); *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D.Utah 2013) (Utah ban on same-sex marriage unconstitutional); *Obergefell v. Wymyslo*, 962 F.Supp.2d 968 (S.D.Ohio 2013) ("*Obergefell II* ") (Ohio anti-recognition law unconstitutional); *Bishop v. United States*, 962 F.Supp.2d 1252 (N.D.Okla.2014) (Oklahoma ban on same-sex marriage unconstitutional); *Bourke v. Beshear*, —— F.Supp.2d ——, 2014 WL 556729 (W.D.Ky. Feb. 12, 2014) (finding that Kentucky anti-recognition law was unconstitutional); *Bostic v. Rainey*, 970 F.Supp.2d 456 (E.D.Va.2014) (Virginia ban on same-sex marriage unconstitutional); *Lee v. Orr*, 2014 WL 683680 (N.D.Ill. Feb. 21, 2014) (Illinois ban on same-sex marriage unconstitutional as applied to a particular county); *De Leon*, —— F.Supp.2d ——, 2014 WL 715741 (issuing preliminary injunction barring Texas from enforcing prohibition on recognition of out-of-state same-sex marriages).

FN9. Notably, Oregon, Virginia, and Nevada have also declined to defend or have abandoned their defense of same-sex marriage bans in those states, on the basis that the laws are unconstitutional. *See, e.g. Geiger et al. v. Kitzhaber, et al.*, Case No. 6:13–cv–018340–MC (D.Or.), *Geiger* Docket No. 47 at ¶ 28 ("State Defendants will not defend the Oregon ban on same-sex marriage in this litigation. Rather, they will take the position in their summary judgment briefing that the ban cannot withstand a federal constitutional challenge under any standard of review."); *Bostic*, 970 F.Supp.2d at ——, 2014 WL 561978, at *2 ("On January 23, 2014, Defendant Rainey, in conjunction with the Office of the Attorney General, submitted a formal change in position, and relinquished her prior defense of Virginia's Marriage Laws."); *Sevcik et al. v. Sandoval et al.*, No. 12–17668 (9th Cir.) (pending appeal), *Sevcik* Appellate Docket No. 171 (defendants withdrawing their brief in support of appeal, because intervening caselaw indicated that "discrimination against same-sex couples is unconstitutional"). In a recent case, the Ninth Circuit also found that classifications based on sexual orientation require heightened scrutiny. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483–84 (9th Cir.2014). Numerous state courts have also found that state bans on same-sex marriage are or likely are unconstitutional. *See, e.g., Garden State Equality v. Dow*, 216 N.J. 314, 79 A.3d 1036 (2013) (in light of *Windsor*, refusing to stay trial court order requiring New Jersey officials to administer marriage laws equally for same-sex couples).

FN10. (*See* Docket No. 35, Defs. Mem., at pp. 14–17.)

FN11. This rule has been applied in a variety of constitutional contexts, including equal protection challenges premised on same-sex

discrimination. *See Bassett v. Snyder*, 951 F.Supp.2d 939 (E.D.Mich.2013) (enjoining Michigan law prohibiting public employers from providing medical and other fringe benefits to any person co-habitating with a public employee unless that person was legally married to the employee, was a legal dependent, or was otherwise ineligible to inherit under the state's intestacy laws); *Obergefell I*, 2013 WL 3814262, at *6 and *6 n. 1 (collecting cases); *De Leon*, ––– F.Supp.2d at ––––, 2014 WL 715741, at *25; *see also Elrod*, 427 U.S. at 373, 96 S.Ct. 2673 (First Amendment); *Ramirez v. Webb*, 835 F.2d 1153, 1158 (6th Cir.1987) (Fourth Amendment); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir.1981) (fundamental right to privacy under Fourteenth and/or Ninth Amendment) (cited approvingly in *Bonnell*, 241 F.3d at 809).

FN12. The state has taken the position that the plaintiffs' fears, including those of Dr. Tanco and Dr. Jesty with respect to the upcoming birth of their baby and their rights in their home should one of them die, are "speculative," "conjectural," and "hypothetical." But the court need not wait, for instance, for Dr. Tanco to die in childbirth to conclude that she and her spouse are suffering or will suffer irreparable injury from enforcement of the Anti–Recognition Laws.

FN13. At least two federal courts have similarly found that, where laws discriminating against same-sex marriages are likely to be found unconstitutional, the balance of the equities unequivocally favors the plaintiffs. As explained in *Obergefell I:*

> No one beyond the plaintiffs themselves will be affected by such a limited order at all. Without an injunction, however, the harm to Plaintiffs is severe. Plaintiffs are not currently accorded the same dignity and recognition as similarly situated opposite-sex couples. Moreover, upon Mr. Arthur's death, Plaintiffs' legally valid marriage will be incorrectly recorded in Ohio as not existing. Balanced against this severe and irreparable harm to Plaintiffs is the truth that there is no evidence in the record that the issuance of a preliminary injunction would cause substantial harm to the public.
>
> 2013 WL 3814262, at *7; *see also De Leon*, ––– F.Supp.2d at –––– – ––––, 2014 WL 715741, at *25–26 (finding that injury to plaintiff outweighed damage to Texas from enjoining enforcement of same-sex marriage ban and anti-recognition law, and stating that "an individual's federal constitutional rights are not submitted to state vote and may not depend on the outcome of state legislation or a state constitution").

M.D.Tenn.,2014.
Tanco v. Haslam
--- F.Supp.2d ----, 2014 WL 997525 (M.D.Tenn.)

END OF DOCUMENT

--- F.Supp.2d ----, 2014 WL 2558444 (W.D.Wis.)
(Cite as: 2014 WL 2558444 (W.D.Wis.))

H

Only the Westlaw citation is currently available.

United States District Court,
W.D. Wisconsin.

Virginia **WOLF** and Carol Schumacher, Kami Young and Karina Willes, Roy Badger and Garth Wangemann, Charvonne Kemp and Marie Carlson, Judith Trampf and Katharina Heyning, Salud Garcia and Pamela Kleiss, William Hurtubise and Leslie Palmer, Johannes Wallmann and Keith Borden, Plaintiffs,

v.

Scott **WALKER**, in his official capacity as Governor of Wisconsin, J .B. Van Hollen, in his official capacity as Attorney General of Wisconsin, Oskar Anderson, in his official capacity as State Registrar of Wisconsin, Joseph Czarnezki, in his official capacity as Milwaukee County Clerk, Wendy Christensen, in her official capacity as Racine County Clerk and Scott McDonell, in his official capacity as Dane County Clerk, Defendants.

No. 14–cv–64–bbc.
Signed June 6, 2014.

John Anthony Knight, Roger Baldwin Foundation of ACLU, Inc., Frank M. Dickerson, III, Gretchen E. Helfrich, Hans J. Germann, Mayer Brown LLP, Chicago, IL, Laurence J. Dupuis, ACLU of Wisconsin Foundation, Inc., Milwaukee, WI, James D. Esseks, American Civil Liberties Union Foundation, New York, NY, for Plaintiffs.

Clayton P. Kawski, Thomas Charles Bellavia, Timothy Craig Samuelson, Wisconsin Department of Justice, David Gault, Madison, WI, Gretchen E. Helfrich, Mayer Brown LLP, Chicago, IL, Paul Bargren, Milwaukee County Corporation Counsel, Milwaukee, WI, John Paul Serketich, Racine, WI, for Defendants.

OPINION and ORDER

BARBARA B. CRABB, District Judge.

***1** Plaintiffs Virginia Wolf, Carol Schumacher, Kami Young, Karina Willes, Roy Badger, Garth Wangemann, Charvonne Kemp, Marie Carlson, Judith Trampf, Katharina Heyning, Salud Garcia, Pamela Kleiss, William Hurtubise, Leslie Palmer, Johannes Wallmann and Keith Borden are eight same-sex couples residing in the state of Wisconsin who either want to get married in this state or want the state to recognize a marriage they entered into lawfully outside Wisconsin. Standing in their way is Article XIII, § 13 of the Wisconsin Constitution, which states that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." In addition, various provisions in the Wisconsin Statutes, primarily in chapter 765, limit marriage to a "husband" and a "wife." The parties agree that both the marriage amendment and the statutory provisions prohibit plaintiffs from marrying in Wisconsin or obtaining legal recognition in Wisconsin for a marriage they entered in another state or country. The question raised by plaintiffs' complaint is whether the marriage amendment and the relevant statutes violate what plaintiffs contend is their fundamental right to marry and their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

Two motions are before the court: (1) a motion to dismiss for failure to state a claim upon which relief may be granted filed by defendants Scott Walker, J.B. Van Hollen and Oskar Anderson, dkt. # 66; and (2) a motion for summary judgment filed by plaintiffs. Dkt. # 70. (Defendants Joseph Czarnezki, Scott McDonell and Wendy Christensen, the clerks for Milwaukee

--- F.Supp.2d ----, 2014 WL 2558444 (W.D.Wis.)
(Cite as: 2014 WL 2558444 (W.D.Wis.))

County, Dane County and Racine County, have not taken a position on either motion, so I will refer to defendants Walker, Van Hollen and Anderson simply as "defendants" for the remainder of the opinion.) In addition, Julaine K. Appling, Jo Egelhoff, Jaren E. Hiller, Richard Kessenich and Edmund L. Webster (all directors or officers of Wisconsin Family Action) have filed an amicus brief on behalf of defendants. Dkt. # 109. Having reviewed the parties' and amici's filings, I am granting plaintiffs' motion for summary judgment and denying defendants' motion to dismiss because I conclude that the Wisconsin laws prohibiting marriage between same-sex couples interfere with plaintiffs' right to marry, in violation of the due process clause, and discriminate against plaintiffs on the basis of sexual orientation, in violation of the equal protection clause.

In reaching this decision, I do not mean to disparage the legislators and citizens who voted in good conscience for the marriage amendment. To decide this case in favor of plaintiffs, it is not necessary, as some have suggested, to "cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools," *United States v. Windsor*, 133 S.Ct. 2675, 2717–18 (2013) (Alito, J., dissenting), or "adjudg[e] those who oppose [same-sex marriage] ... enemies of the human race." *Id.* at 2709 (Scalia, J., dissenting). Rather, it is necessary to conclude only that the state may not intrude without adequate justification on certain fundamental decisions made by individuals and that, when the state does impose restrictions on these important matters, it must do so in an even-handed manner.

***2** This case is not about whether marriages between same-sex couples are consistent or inconsistent with the teachings of a particular religion, whether such marriages are moral or immoral or whether they are something that should be encouraged or discouraged. It is not even about whether the plaintiffs in this case are as capable as opposite-sex couples of maintaining a committed and loving relationship or raising a family together. Quite simply, this case is about liberty and equality, the two cornerstones of the rights protected by the United States Constitution.

Although the parties in this case disagree about many issues, they do agree about at least one thing, which is the central role that marriage plays in American society. It is a defining rite of passage and one of the most important events in the lives of millions of people, if not *the* most important for some. Of course, countless government benefits are tied to marriage, as are many responsibilities, but these practical concerns are only one part of the reason that marriage is exalted as a privileged civic status. Marriage is tied to our sense of self, personal autonomy and public dignity. And perhaps more than any other endeavor, we view marriage as essential to the pursuit of happiness, one of the inalienable rights in our Declaration of Independence. Linda Waite and Maggie Gallagher, *Case for Marriage* 2 (Broadway Books 2000) (stating that 93% of Americans rate "having a happy marriage" as one of their most important goals, an ever higher percentage than "being in good health"). For these reasons and many others, "marriage is not merely an accumulation of benefits. It is a fundamental mark of citizenship." Andrew Sullivan, "State of the Union," *New Republic* (May 8, 2000). Thus, by refusing to extend marriage to the plaintiffs in this case, defendants are not only withholding benefits such as tax credits and marital property rights, but also denying equal citizenship to plaintiffs.

It is in part because of this strong connection between marriage and equal citizenship that the marriage amendment must be scrutinized carefully to determine whether it is consistent with guarantees of the Constitution. Defendants and amici defend the marriage ban on various grounds, such as preserving tradition and wanting to proceed with caution, but if the state is going to deprive an entire class of citizens of a right as fundamental as marriage, then it must do more than say "this is the way it has always been" or "we're not ready yet." At the very least it must make a

showing that the deprivation furthers a legitimate interest separate from a wish to maintain the status quo. Defendants attempt to do this by arguing that allowing same-sex couples to marry may harm children or the institution of marriage itself. Those concerns may be genuine, but they are not substantiated by defendants or by amici.

Under these circumstances, personal beliefs, anxiety about change and discomfort about an unfamiliar way of life must give way to a respect for the constitutional rights of individuals, just as those concerns had to give way for the right of Amish people to educate their children according to their own values, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), for Jehovah's Witnesses to exercise their religion freely, *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), and for interracial couples to marry the person they believed was irreplaceable. *Loving v. Virginia*, 388 U.S. 1 (1967). In doing this, courts do not "endorse" marriage between same-sex couples, but merely affirm that those couples have rights to liberty and equality under the Constitution, just as heterosexual couples do.

BACKGROUND

***3** All plaintiffs in this case are same-sex couples. Virginia Wolf and Carol Schumacher reside in Eau Claire, Wisconsin; Kami Young and Karina Willes reside in Milwaukee, Wisconsin. Both couples left Wisconsin to enter into a legal marriage in Minnesota and they wish to have their marriages recognized in Wisconsin. At the time that plaintiffs filed their summary judgment motion, plaintiffs Young and Willes were expecting a baby imminently.

Johannes Wallmann and Keith Borden reside in Madison, Wisconsin. They were married in Canada in 2007 and wish to have their marriage recognized in Wisconsin.

Roy Badger and Garth Wangemann reside in Milwaukee, Wisconsin, as do Charvonne Kemp and Marie Carlson. Judi Trampf and Katy Heyning reside in Madison, Wisconsin, as do plaintiffs Salud Garcia and Pam Kleiss. William Hurtubise and Leslie "Dean" Palmer reside in Racine, Wisconsin. Each of these five couples wishes to marry in Wisconsin. Hurtubise and Palmer want to adopt a child jointly, which they cannot do in Wisconsin while they are unmarried.

All plaintiffs meet the requirements for getting married in Wisconsin, with the exception that each wishes to marry someone of the same sex.

OPINION

I. PRELIMINARY ISSUES

Defendants raise three preliminary arguments supporting their belief that Wisconsin's marriage ban on same-sex couples is immune from constitutional review, at least in this court: (1) *Baker v. Nelson*, 409 U.S. 810 (1972), is controlling precedent that precludes lower courts from considering challenges to bans on same-sex marriage under the due process clause or the equal protection clause; (2) marriage between same-sex couples is a "positive right," so the state has no duty to grant it; (3) under principles of federalism, states are entitled to choose whether to extend marriage rights to same-sex couples. None of these arguments is persuasive.

A. *Baker v. Nelson*

In *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn.1971), the Minnesota Supreme Court held that same-sex couples do not have a right to marry under the due process clause or the equal protection clause of the United States Constitution. When the plaintiffs appealed, the United States Supreme Court had "no discretion to refuse adjudication of the case on its merits" because the version of 28 U.S.C. § 1257 in effect at the time required the Court to accept any case from a state supreme court that raised a constitutional challenge to a state statute. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). (In 1988, Congress amended § 1257 to eliminate mandatory jurisdiction in this context).

However, the Court "was not obligated to grant the case plenary consideration," *id.*, and it chose not to do so, instead issuing a one sentence order stating that "[t]he appeal is dismissed for want of a substantial federal question." *Baker v. Nelson*, 409 U.S. 810 (1972). At the time, this type of summary dismissal was a common way for the Court to manage the relatively large number of cases that fell within its mandatory jurisdiction. Randy Beck, *Transtemporal Separation of Powers in the Law of Precedent*, 87 Notre Dame L.Rev. 1405, 1439–40 (2012) ("Because the volume of ... mandatory appeals did not permit full briefing and argument in every case, the Court adopted the practice of summarily affirming many lower court decisions and summarily dismissing others for want of a substantial federal question. These summary affirmances and dismissals were routinely issued without any opinion from the Court explaining its disposition."). In fact, a few years later, the Court similarly handled another case involving gay persons when it summarily affirmed a decision upholding the constitutionality of a statute criminalizing sodomy. *Doe v. Commonwealth's Attorney for City of Richmond*, 403 F.Supp. 1199 (E.D.Va.1975), *aff'd*, 425 U.S. 901 (1976).

***4** Despite the absence of an opinion, full briefing or oral argument, a summary dismissal such as *Baker* is binding precedent "on the precise issues presented and necessarily decided by" the lower court. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). *See also Chicago Sheraton Corp. v. Zaban*, 593 F.2d 808, 809 (7th Cir.1979) ("[A] summary disposition for want of a substantial federal question is controlling precedent."). As a result, defendants argue that this court has no authority to consider the question whether a ban on marriage between same-sex couples violates the Constitution. They cite *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), in which the Court stated that lower courts should adhere to the holdings of the Supreme Court, even if they "appea[r] to rest on reasons rejected in some other line of decisions, ... leaving to this Court the prerogative of overruling its own decisions."

The rule for summary affirmances and dismissals is not so clear cut. Those orders "are not of the same precedential value as would be an opinion of [the Supreme] Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). For example, a summary dismissal is no longer controlling "when doctrinal developments indicate" that the Court would take a different view now. *Hicks*, 422 U.S. at 344 (internal quotations omitted). *See also* C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill–Advised Rejection of Anticipatory Overruling*, 59 Fordham L.Rev. 39, 51 (1990) (citing *Hicks* for the proposition that "a precedent that has not been overruled may be disregarded when later doctrinal developments render it suspect.").

It would be an understatement to say that the Supreme Court's jurisprudence on issues similar to those raised in *Baker* has developed substantially since 1972. At the time, few courts had addressed any issues relating to the constitutional rights of gay persons; favorable decisions were even less frequent. *E.g.*, *Boutilier v. Immigration & Naturalization Service*, 387 U.S. 118 (1967) (homosexual individual could be denied admission to United States on ground that homosexuality is a "psychopathic personality"). Perhaps because there were so few people who identified publicly as gay, it was difficult for courts to empathize with their plight.

In more recent years, the Supreme Court has issued a series of cases in which it has denounced the view implicit in cases such as *Baker* that gay persons are "strangers to the law." *Romer v. Evans*, 517 U.S. 620, 635–36 (1996). In *Romer*, the Court invalidated under the equal protection clause a state constitutional amendment that discriminated on the basis of sexual orientation. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court concluded that a Texas law criminalizing homosexual sodomy violated the due process clause, overruling *Bowers v. Hardwick*, 478 U.S 186

(1986), and implicitly the summary affirmance in *Doe*, 425 U.S. 901 (which the Court did not even mention).

***5** To the extent *Romer* and *Lawrence* left any room for doubt whether the claims in this case raise a substantial federal question, that doubt was resolved in *United States v. Windsor*, 133 S.Ct. 2675 (2013), in which the Court invalidated the Defense of Marriage Act, a law prohibiting federal recognition of same-sex marriages authorized under state law. Before the case reached the Supreme Court, the Court of Appeals for the Second Circuit had discussed at length the continuing vitality of *Baker* and the majority had concluded over a vigorous dissent that *Baker* was no longer controlling. *Compare Windsor v. United States*, 699 F.3d 169, 178–79 (2d Cir.2012) ("Even if *Baker* might have had resonance for Windsor's case in 1971, it does not today."), *with id.* at 210 (Straub, J., dissenting) ("Subjecting the federal definition of marriage to heightened scrutiny would defy or, at least, call into question the continued validity of *Baker*, which we are not empowered to do."). On appeal before the Supreme Court, those defending the law continued to press the issue, arguing that the lower court's rejection of *Baker* as precedent made "the case for this Court's review ... overwhelming." *Windsor v. United States of America*, Nos. 12–63 and 12–307, Supplemental Brief for Respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives, *available at* 2012 WL 5388782, at *5–6.

Despite the lower court's and the parties' debate over *Baker*, the Supreme Court ignored the case in both its decision and during the oral argument for *Windsor*. (In a companion case regarding same-sex marriage that was dismissed on prudential grounds, counsel for petitioners began discussing *Baker* during oral argument, but Justice Ginsburg cut him off, stating, "Mr. Cooper, *Baker v. Nelson* was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny." Oral argument in *Hollingsworth v. Perry*, No. 12–144, available at 2013 WL 1212745, at * 12.) The Court's silence is telling. Although the Court did not overrule Baker, the Court's failure to even acknowledge *Baker* as relevant in a case involving a restriction on marriage between same-sex persons supports a view that the Court sees *Baker* as a dead letter. *Cf. Romer*, 517 U.S. at 642 (Scalia, J, dissenting) (noting Court's failure to discuss *Bowers* in case decided before Court overruled *Bowers* in *Lawrence*). Not even the dissenters in *Windsor* suggested that *Baker* was an obstacle to lower court consideration challenges to bans on same-sex marriage.

Before *Windsor*, the courts were split on the question whether *Baker* was still controlling. *Compare Pedersen v. Office of Personnel Management*, 881 F.Supp.2d 294, 307 (D.Conn.2012) (*Baker* not controlling); *Smelt v. County of Orange*, 374 F.Supp.2d 861, 873 (C.D.Cal.2005) (same); *In re Kandu*, 315 B.R. 123, 138 (Bankr.W.D.Wash.2004) (same), *with Massachusetts v. United States Dept. of Health and Human Services*, 682 F.3d 1, 8 (1st Cir.2012) (*Baker* controlling); *Sevcik v. Sandoval*, 911 F.Supp.2d 996, 1003 (D.Nev.2012) (same); *Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1086(D.Haw.2012) (same); *Morrison v. Sadler*, 821 N.E.2d 15, 19 (Ind.Ct.App.2005) (same). (Oddly, the first federal court to rule in favor of the right of same-sex couples to marry did not discuss *Baker*. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D.Cal.2010).) Since *Windsor*, nearly every court to consider the question has concluded that *Baker* does not preclude review of challenges to bans on same-sex marriage. *E.g., Latta v. Otter*, 1:13–CV–00482–CWD, —— F.Supp.2d. ——, 2014 WL 1909999, *9 (D.Idaho May 13, 2014); *Bostic v. Rainey*, 970 F.Supp.2d. 456, 470 (E.D.Va.2014); *Bishop v. U.S. ex rel. Holder*, 962 F.Supp.2d 1252, 1277 (N.D.Okla.2014); *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1195 (D.Utah 2013). The only outlier seems to be *Merritt v. Attorney General*, CIV.A. 13–00215–BAJ, 2013 WL 6044329 (M.D.La. Nov. 14, 2013), in which the court cited *Baker* for the proposition that "the Constitution does

not require States to permit same-sex marriages." However, *Merritt* is not persuasive because the court did not discuss *Romer*, *Lawrence* or *Windsor* in its decision.

***6** Even defendants seem to acknowledge that the writing is on the wall. Although this is a threshold issue, they bury their short discussion of it at the end of their summary judgment brief. Accordingly, I conclude that, despite *Baker*, I may consider the merits of plaintiffs' claim.

B. *Positive Rights vs. Negative Rights*

What is perhaps defendants' oddest argument relies on a distinction between what defendants call "positive rights" and "negative rights." In other words, the Constitution protects the rights of individuals to be free from government interference ("negative rights"), but it does not give them a right to receive government benefits ("positive rights"). Defendants cite cases such as *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195 (1989), for the proposition that the Constitution "confer[s] no affirmative right to governmental aid." Thus, defendants say, although the due process clause may protect the right of individuals to engage in certain intimate conduct (a "negative right"), it "does not preclude a state from choosing not to give same-sex couples the positive right to enter the legal status of civil marriage under state law." Dfts.' Br., dkt. # 102, at 8.

Defendants' argument has two problems. First, the Supreme Court has held on numerous occasions that marriage is a fundamental right protected by the Constitution. *E.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639–640 (1974); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Thus, even if marriage is a "positive right" as defendants understand that term, marriage stands as an exception to the general rule.

Second, even if I assume that the state would be free to abolish the institution of marriage if it wished, the fact is that Wisconsin obviously has *not* abolished marriage; rather, it has limited the class of people who are entitled to marry. The question in this case is not whether the state is required to issue marriage licences as a general matter, but whether it may discriminate against same-sex couples in doing so. Even in cases in which an individual does not have a substantive right to a particular benefit or privilege, once the state extends that benefit to some of its citizens, it is not free to deny the benefit to other citizens for any or no reason on the ground that a "positive right" is at issue. In fact, under the equal protection clause, "the right to equal treatment ... is not co-extensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739, 646 (1984). Therefore, "[t]he State may not ... selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney*, 489 U.S. at 197 n.3.

Defendants fail to distinguish this case from the others in which the Supreme Court considered the constitutionality of laws that denied the right to marry to some class of citizens. *Loving*, 388 U.S. 1 (interracial marriage); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage of parents who fail to make child support payments); *Turner v. Safley*, 482 U.S. 78 (1987) (marriage of prisoners). Although defendants say that their argument is "consistent" with *Loving*, *Zablocki* and *Turner* because those cases did nothing more than "recognize a negative right," Dfts.' Br., dkt. # 102, at 10, defendants do not explain why marriage is a "positive right" when the state discriminates on the basis of sexual orientation, but a "negative right" when it discriminates on the basis of race, custody or financial status.

***7** Defendants make a related argument that the government should not be required to "officially endorse the intimate and domestic relationships that gay and lesbian persons may choose to enter." Dfts.' Br., dkt. # 102, at 9. They cite cases in which the Court

held that there is no constitutional right to subsidies for having an abortion and that the government is entitled to have a preference for childbirth. *Rust v. Sullivan*, 500 U.S. 173, 201 (1991); *Webster v. Reproductive Health Services*, 492 U.S. 490, 509 (1989). Along the same lines, defendants argue that they are entitled to have a preference for marriage between opposite-sex couples.

Even setting aside the many obvious factual differences between marriage and abortion, the analogy defendants attempt to draw is inapt for three reasons. First, as noted above, the state is already issuing marriage licenses to some citizens. The comparison to abortion would be on point only if, in the cases cited, the state had decided to fund abortions for heterosexual women but not for lesbians.

Second, abortion cannot be compared to marriage because the government does not have a monopoly on providing abortions. In other words, if the government refuses to use its resources to provide or fund abortions, a woman may seek an abortion somewhere else. In contrast, it is the state and only the state that can issue a marriage license. Thus, defendants' "preference" for marriage between opposite-sex couples is not simply a denial of a subsidy, it is a denial of the right itself.

Defendants' concern about "endorsing" marriage between same-sex couples seems to be one that has been shared by both judges and legislators in the past. *E.g.*, *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 986–87 (Mass.2003) (Cordy, J., dissenting) ("The plaintiffs' right to privacy ... does not require that the State officially endorse their choices in order for the right to be constitutionally vindicated."); *Dean v. District of Columbia* CIV.A. 90–13892, 1992 WL 685364, *4 (D.C.Super. June 2, 1992) ("[L]egislative authorization of homosexual, same-sex marriages would constitute tacit state approval or endorsement of the sexual conduct, to wit, sodomy, commonly associated with homosexual status."); Transcript of the Mark–Up Record of the Defense of Marriage Act, House Judiciary Committee, June 12, 1996 (statement of Rep. Sonny Bono that he is voting for DOMA because "I can't tell my son [same-sex marriage is] ok, or I don't think I can yet."). These concerns may be common, but they rest on a false assumption about constitutional rights. Providing marriage licenses to same-sex couples on an equal basis with opposite-sex couples is not "endorsing" same-sex marriage; rather, it simply represents "a commitment to the law's neutrality where the rights of persons are at stake." *Romer*, 517 U.S. at 623. *See also Bowers*, 478 U .S. at 205–06 (Blackmun, J., dissenting) ("[A] necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices.").

***8** There are many situations in which the Constitution requires the government to provide benefits using neutral criteria, even with respect to groups that are unpopular or that the government finds abhorrent, without any connotation that the government is endorsing the group. *E.g.*, *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995) (public university could not rely on concerns of improper endorsement to justify refusal to fund student newspaper when funds were available to similarly situated groups); *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995) (state could not rely on concerns about endorsement to deny request of Ku Klux Klan to erect monument on public land when other similarly situated groups were allowed to do so). Thus, extending marriage to same-sex couples does not require "approval" of homosexuality any more than the Supreme Court "approved" of convicted criminals or deadbeat dads when it held in *Turner*, 482 U.S. 78, and *Zablocki*, 434 U.S. 374, that the right to marry extends to prisoners and fathers who have failed to make child support payments. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569 (Mass.2004) ("This is not a matter of social policy but of constitutional interpretation."); *Baker v. State*, 744 A.2d 864, 867 (Vt.1999) ("The issue before the Court

... does not turn on the religious or moral debate over intimate same-sex relationships, but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.").

C. *Judicial Restraint, Federalism and Respect for the Democratic Process*

Defendants and amici argue that federal courts should not question a state's democratic determination regarding whether and when to extend marriage to same-sex couples. Rather, courts should allow states to serve as "laboratories of democracy" so that each state can learn from the experience of others and decide what works best for its own citizens. *Oregon v. Ice,* 555 U.S. 160, 171 (2009); *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Defendants rely generally on principles of federalism and more specifically on the fact that regulation of marriage is a matter traditionally left to the states. A number of courts and dissenting judges in other cases have asserted a similar argument. *Windsor,* 133 S.Ct. at 2718–19 (Alito, J., dissenting) ("Because our constitutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence."); *In re Marriage Cases,* 183 P.3d 384, 463–64 (Cal.2008) (Baxter, J., dissenting) ("By ... moving the policy debate from the legislative process to the court, the majority engages in faulty constitutional analysis and violates the separation of powers."); *Hernandez v. Robles,* 855 N.E.2d 1, 12 (N.Y.2006) ("[W]e believe the present generation should have a chance to decide the issue through its elected representatives. We therefore express our hope that the participants in the controversy over same-sex marriage will address their arguments to the Legislature; that the Legislature will listen and decide as wisely as it can; and that those unhappy with the result—as many undoubtedly will be—will respect it as people in a democratic state should respect choices democratically made."); *Goodridge,* 798 N .E.2d at 974 (Spina, J., dissenting) ("What is at stake in this case is not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts, pursuant to art. 30 of the Massachusetts Declaration of Rights.").

***9** Although I take no issue with defendants' observations about the important role that federalism plays in this country, that does not mean that a general interest in federalism trumps the due process and equal protection clauses. States may not "experiment" with different social policies by violating constitutional rights.

The fundamental problem with defendants' argument is that it cannot be reconciled with the well-established authority of federal courts to determine the constitutionality of state statutes or with the Fourteenth Amendment, the very purpose of which was to protect individuals from overreaching by the states. *Jackson v. City of Joliet,* 715 F.2d 1200, 1203 (7th Cir.1983) ("The Fourteenth Amendment ... sought to protect Americans from oppression by state government."); *De Leon v. Perry,* 975 F.Supp.2d 632, 665 (W.D.Tex.2014) ("One of the court's main responsibilities is to ensure that individuals are treated equally under the law."). To further that purpose, federal courts have invalidated state laws that violate constitutional rights, even when the law enjoys popular support and even when the subject matter is controversial. *City of Cleburne, Texas v. Cleburne Living Center,* 473 U.S. 432, 448 (1985) ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause."); *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press,

freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."); *Chambers v. State of Florida*, 309 U.S. 227, 241 (1940) ("Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."); Laurence Tribe, *American Constitutional Law* § 15–10, at 1351 (2d ed. 1988) ("As in the case of racial segregation, it is often when public sentiment is most sharply divided that the independent judiciary plays its most vital national role in expounding and protecting constitutional rights.").

Federalism was a common defense to the segregationist laws of the Jim Crow era. *E.g.*, *Naim v. Naim*, 87 S.E.2d 749, 756 (Va.1955) (in case upholding anti-miscegenation law, stating that "[r]egulation of the marriage relation is, we think, distinctly one of the rights guaranteed to the States and safeguarded by that bastion of States' rights"). *See also Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 397 (1969) (Douglas, J., dissenting) ("States' rights are often used as a cloak to cover unconstitutional encroachments such as the maintenance of second-class citizenship for Negroes or Americans of Mexican ancestry."). However, that defense has long since been discredited. Defendants' federalism argument arises in a different context, but they identify no way to distinguish their argument from those the Supreme Court rejected long ago. *Andersen v. King County*, 138 P.3d 963, 1028–29 (Wash.2006) (Bridges, J., dissenting) (in case involving claim for same-sex marriage, stating that, "had the United States Supreme Court adopted the plurality's [view of federalism], there would have been no *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).").

***10** Although Wisconsin's same-sex marriage ban was approved by a majority of voters, is part of the state constitution and deals with a matter that is a traditional concern of the states, none of these factors can immunize a law from scrutiny under the United States Constitution. The Supreme Court has not hesitated to invalidate any of those types of laws if it concludes that the law is unconstitutional. *Romer*, 517 U.S. 620 (invalidating state constitutional amendment); *Lucas v. Forty–Fourth General Assembly of State of Colorado*, 377 U.S. 713, 736–37 (1964) ("[T]hat [a law] is adopted in a popular referendum is insufficient to sustain its constitutionality.... A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."); *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954) (striking down school segregation while noting that "education is perhaps the most important function of state and local governments"). *See also Baehr v. Lewin*, 852 P.2d 44, 68 (Haw.1993) ("The result we reach today is in complete harmony with the *Loving* Court's observation that any state's powers to regulate marriage are subject to the constraints imposed by the constitutional right to the equal protection of the laws."). Even in *Baker*, 191 N.W.2d at 187, in which the Minnesota Supreme Court brushed off a marriage claim brought by a same-sex couple, the court acknowledged that "*Loving* does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment."

To the extent that defendants mean to argue that a special rule should apply to the issue of same-sex marriage, they cite no authority for that view. There is no asterisk next to the Fourteen Amendment that excludes gay persons from its protections. Romer, 517 U.S. at 635.

In a footnote, amici argue that cases such as *Loving*, *Turner* and *Zablocki* are distinguishable because they "all involved laws that prevented individuals otherwise qualified for marriage from marrying, and have not gone to the essentials of what marriage means as the claim in this case does." Amici Br., dkt. #

109, at 17 n.3. However, this argument has nothing to do with federalism or the democratic process; rather, it goes to the scope of the right to marry, which is discussed below. Even if I assume for the purpose of this discussion that amici are correct about the distinction between this and previous cases about marriage, it would not mean that a general interest in what amici call "state sovereignty" would preclude review of Wisconsin laws banning same-sex marriage.

Defendants and amici cite *Windsor*, 133 S.Ct. 2675, and *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623 (2014), to support their argument, but neither case is on point. First, defendants quote the statement in *Schuette* that there is "a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Schuette*, 134 S.Ct. at 1637. However, the holding in *Schuette* was that Michigan did not violate the equal protection clause by enacting a state constitutional amendment that *prohibits* discrimination in various contexts. The Court said nothing about state laws such as Wisconsin's marriage amendment that *require* discrimination and the Court did not suggest that such laws are immune from constitutional review.

***11** *Windsor* is closer to the mark, but not by much. It is true that the Supreme Court noted multiple times in its decision that the regulation of marriage is a traditional concern of the states. *Windsor*, 133 S.Ct. at 2689–90 ("By history and tradition the definition and regulation of marriage, as will be discussed in more detail, has been treated as being within the authority and realm of the separate States."); *id.* at 2691 ("[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States.") (internal quotations omitted). In addition, the Court noted that the Defense of Marriage Act departed from that tradition by refusing to defer to the states' determination of what qualified as a valid marriage. *Id.* at 2692("DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.").

However, defendants' and amici's reliance on *Windsor* is misplaced for three reasons. First, the Supreme Court's observations were not new; the Court has recognized for many years that the regulation of marriage is primarily a concern for the states. In his dissent, Justice Scalia noted this point and questioned the purpose of the Court's federalism discussion. *Id.* at 2705 (Scalia, J., dissenting) ("But no one questions the power of the States to define marriage (with the concomitant conferral of dignity and status), so what is the point of devoting seven pages to describing how long and well established that power is?"). Thus, it would be inappropriate to infer that the Court was articulating a new, heightened level of deference to marriage regulation by the states.

Second, the Court declined expressly to rely on federalism as a basis for its conclusion that DOMA is unconstitutional. *Windsor*, 133 S.Ct. at 2692 ("[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance."). *See also id.* at 2705 (Scalia, J., dissenting) ("[T]he opinion has formally disclaimed reliance upon principles of federalism."). *But see id.* at 2697 (Roberts, C.J., dissenting) ("[I]t is undeniable that its judgment is based on federalism.").

Third, and most important, the Court discussed DOMA's encroachment on state authority as *evidence that the law was unconstitutional*, not as a reason to preserve a law that otherwise would be invalid. In fact, the Court was careful to point out multiple times the well-established principle that an interest in federalism cannot trump constitutional rights. *Id.* at 2691 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons."); *id.* at 2692 ("[T]he incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary,

subject to constitutional guarantees, from one State to the next."); *id.* ("The States' interest in defining and regulating the marital relation [is] subject to constitutional guarantees.").

***12** All this is not to say that concerns about federalism and the democratic process should be ignored when considering constitutional challenges to state laws. It is obvious that courts must be sensitive to judgments made by the legislature and the voters on issues of social policy and should exercise the power of judicial review in rare instances. However, these concerns are addressed primarily in the context of determining the appropriate standard of review. We are long past the days when an invocation of "states' rights" is enough to insulate a law from a constitutional challenge.

II. STANDARD OF REVIEW

Plaintiffs' claim arises under two provisions in the Fourteenth Amendment to the United States Constitution. First, plaintiffs contend that Wisconsin's ban on same-sex marriage violates their fundamental right to marry under the due process clause. Second, they contend that the ban discriminates against them on the basis of sex and sexual orientation, in violation of the equal protection clause. As other courts have noted, the rights guaranteed by these constitutional provisions "frequently overlap." *Goodridge*, 798 N.E.2d at 953. *See also Lawrence*, 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects."). In this case, the ultimate question under both provisions is whether the state may discriminate against same-sex couples in the context of issuing marriage licenses and recognizing marriages performed in other states. However, each clause presents its own questions about the appropriate standard of review. I will address the standard first under the due process clause and then under the equal protection clause.

A. *Fundamental Right to Marry*

The "liberty" protected by the due process clause in the Fourteenth Amendment includes the "fundamental right" to marry, a conclusion that the Supreme Court has reaffirmed many times. *Turner*, 482 U.S. at 95 ("[T]he decision to marry is a fundamental right."); *Zablocki*, 434 U.S. at 384 ("[The] right to marry is of fundamental importance for all individuals."); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639–640 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Loving*, 388 U.S. at 12 (referring to marriage as "fundamental freedom"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (right to marry is "central part of the liberty protected by the Due Process Clause"). In *Loving*, 388 U.S. at 12, the Court went so far as to say that marriage is "one of the basic civil rights of man."

The Supreme Court has articulated a standard of review "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right" such as the right to marry, which is that the law "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388. *See also Beller v. Middendorf*, 632 F.2d 788, 807 (9th Cir.1980) (Kennedy, J.) ("[S]ubstantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals.").

1. *Scope of the right to marry*

***13** The threshold question under the *Zablocki* standard is whether the right to marry encompasses a right to marry someone of the same sex. Defendants say that it does not, noting that "[t]he United States Supreme Court has never recognized" a "right to marry a person of the same sex" and that same-sex

marriage is not "deeply rooted in this Nation's history and tradition," which defendants say is a requirement to qualify as a fundamental right under the Constitution, citing *Washington v. Glucksberg*, 521 U.S. 702 (1997). Dfts.' Br., dkt. # 102, at 26. Amici add that "our Nation's law, along with the law of our antecedents from ancient to modern times, has consistently recognized the biological and social realities of marriage, including its nature as a male-female unit advancing purposes related to procreation and childrearing." Amici Br., dkt. # 109, at 6. They cite cases in which they say the Supreme Court has "explicitly linked marriage and procreation." *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."), *and Maynard v. Hill*, 125 U.S. 190, 211 (1888) (marriage is "the foundation of the family.")). For many years, arguments similar to these were accepted consistently by the courts. *E.g.*, *Sevcik*, 911 F.Supp.2d at 1013–14; *Jackson*, 884 F.Supp.2d at 1071; *Hernandez*, 855 N.E.2d at 10; *Andersen*, 138 P.3d at 979; *Lewis v. Harris*, 908 A.2d 196, 210 (N.J.2006); *Dean*, 1992 WL 685364.

Defendants' observation that the Supreme Court has not yet recognized a "right to same-sex marriage" is both obvious and unhelpful. When the Court struck down Virginia's anti-miscegenation law in *Loving*, it had never before discussed a "right to interracial marriage." If the Court had decided previously that the Constitution protected marriage between same-sex couples, this case would not be here. The question is not whether plaintiffs' claim is on all fours with a previous case, but whether plaintiffs' wish to marry someone of the same sex falls within the right to marry already firmly established in Supreme Court precedent. For several reasons, I conclude that it does.

a. Purposes of marriage

I am not persuaded by amici's argument that marriage's link to procreation is the sole reason that the Supreme Court has concluded that marriage is protected by the Constitution. Although several courts have adopted that view, *e.g.*, *Dean v. District of Columbia*, 653 A.2d 307, 332 (D.C.1995); *Baehr*, 852 P.2d at 56, I believe tat it is misguided. First, gay persons have the same ability to procreate as anyone else and same-sex couples often raise children together, so there is no reason why a link between marriage and procreation should disqualify same-sex couples.

Second, although the Supreme Court has identified procreation as *a* reason for marriage, it has never described procreation as a requirement. This point has been clear at least since *Griswold v. Connecticut*, 381 U.S. 479 (1965). If it were true that the Court viewed procreation as a necessary component of marriage, it could not have found that married couples have a constitutional right *not* to procreate by using contraception. Instead, the Court described marriage as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Id.* at 486.

***14** To the extent that *Griswold* leaves any ambiguity, it is resolved by *Turner*, 482 U.S. 78, which raised the question whether prisoners retain the right to marry while incarcerated. The Supreme Court concluded that they did, despite the fact that the vast majority of prisoners cannot procreate with their spouses. The Court stated:

> Many important attributes of marriage remain ... after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage

> may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

Id. at 95–96. *Turner* makes it clear that the Court views marriage as serving a variety of important purposes for the couple involved, which may or may not include procreation, and that it is ultimately for the couple to decide what marriage means to them. (Although the Court stated that most inmate marriages "will be fully consummated" when the prisoner is released, there is obviously a difference between consummating a marriage and procreation. In any event, the Court did not suggest that an intent to consummate is a prerequisite to marriage.) Because defendants identify no reason why same-sex couples cannot fulfill the Court's articulated purposes of marriage just as well as opposite-sex couples, this counsels in favor of interpreting the right to marry as encompassing the choice of a same-sex partner.

b. Nature of the decision

In describing the type of conduct protected by the due process clause, including marriage, family relationships, contraception, education and procreation, the Supreme Court has stated that the common thread is that they all relate to decisions that are central to the individual's sense of identity and ability to control his or her own destiny. This point may have been made most clearly in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992):

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

***15** *See also Lawrence*, 539 U.S. at 578 (state may not "control th[e] destiny" of its citizens by criminalizing certain intimate conduct); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (Constitution protects right "to be free from unwarranted governmental intrusion into matters ... fundamentally affecting a person.").

In addition, the Supreme Court has stated that the liberty protected in the due process clause includes the right to choose your own family. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499, 506 (1977) ("A host of cases ... have consistently acknowledged a private realm of family life which the state cannot enter.... [W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."). With respect to marriage in particular, the Supreme Court has stated repeatedly that it is a matter of individual choice. *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) ("[T]he regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse."); *Loving*, 388 U.S. at 12 ("Under our Constitution, the

freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State ... The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness."). *See also Zablocki,* 434 U.S. at 403–04 (Stevens, J., concurring in the judgment) ("The individual's interest in making the marriage decision independently is sufficiently important to merit special constitutional protection.").

In *Bowers,* when the Supreme Court refused to acknowledge that homosexual relationships are entitled to constitutional protection, Justice Blackmun noted in his dissent that the Court was being inconsistent with previous cases in which it had protected decisions that "form so central a part of an individual's life." *Bowers,* 478 U.S. at 204–05 (Blackmun, J., dissenting). *See also id.* at 218–19 (Stevens, J., dissenting) ("[E]very free citizen has the same interest in 'liberty' that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life."). In *Lawrence,* 539 U.S. at 567, the Court acknowledged that, in *Bowers,* it had "fail[ed] to appreciate the extent of the liberty at stake," when it framed the question as whether there is a "right to homosexual sodomy." Instead, the Court should have recognized that "our laws and tradition afford constitutional protection" to certain "personal decisions" and that "[p]ersons in a homosexual relationship may seek autonomy" to make those decisions "just as heterosexual persons do." *Id.* at 574.

***16** Of course, *Lawrence* is not directly on point because that case was about sexual conduct rather than marriage, but even in *Lawrence,* the Supreme Court acknowledged that sexual conduct is but "one element in a personal bond that is more enduring." *Lawrence,* 539 U.S. at 567. The Court went on to state that its holding "should counsel against attempts by the State, or a court, to define the meaning of the relationship *or to set its boundaries* absent injury to a person or abuse of an institution the law protects." *Id.* (emphasis added). More generally, the Court reaffirmed the principle that, in determining the scope of a right under the due process clause, the focus should be on the nature of the decision at issue and not on who is making that decision. *Turner,* 478 U.S. 82 (right to marry extends to prisoners); *Zablocki,* 434 U.S. 374 (right to marry extends to father who failed to make court-ordered child support payments); *Eisenstadt,* 405 U.S. at 453 (right of married couples to use contraception recognized in *Griswold* must be extended to single persons as well). *See also Latta,* 2014 WL 1909999, at * 12 ("[The argument that the right to same-sex marriage is a] 'new right' ... attempts to narrowly parse a right that the Supreme Court has framed in remarkably broad terms. *Loving* was no more about the 'right to interracial marriage' than *Turner* was about the 'prisoner's right to marry' or *Zablocki* was about the 'dead-beat dad's right to marry.' ").

If the scope of the right to marry is broad enough to include even those whose past conduct suggests an inclination toward violating the law and abdicating responsibility, then it is difficult to see why it should not be broad enough to encompass same-sex couples as well. Defendants do not suggest that the decision about whom to marry is any less important or personal for gay persons than it is for heterosexuals. Accordingly, I conclude defendants are making the same mistake as the Court in *Bowers* when they frame the question in this case as whether there is a "right to same-sex marriage" instead of whether there is a right to marriage from which same-sex couples can be excluded. *Latta,* 2014 WL 1909999, at *13; *Kitchen,* 961 F.Supp.2d at 1199–1200; *Andersen,* 138 P.3d at 1022 (Fairhurst, J., dissenting).

c. History of exclusion

Defendants argue that including the choice of a same-sex partner within the right to marry would contradict *Washington v. Glucksberg,* 521 U.S. 702, 722 (1997), in which the Supreme Court stated that its

"substantive-due-process jurisprudence ... has been a process whereby the outlines of the 'liberty' specially protected by the Fourteenth Amendment ... have ... been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition." Although the Court previously had recognized "the right of a competent individual to refuse medical treatment," it declined to expand the scope of that right to include a more general "right to commit suicide," in part because of "a consistent and almost universal tradition that has long rejected the asserted right" to suicide. *Id.* at 723–24. Defendants say that a similar conclusion is required with respect to the right of same-sex couples to marry because that right had not been recognized in any state until recently.

***17** As an initial matter, it is hard to square aspects of *Glucksberg* with the holdings in *Griswold* and *Roe v. Wade*, 410 U.S. 113 (1973), in which the Court recognized the rights to contraception and abortion, neither of which were "deeply rooted" in the country's legal tradition at the time. *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting) ("Roe [has] been ... eroded by *[Glucksberg]* ... [because] ... *Roe* ... subjected the restriction of abortion to heightened scrutiny without even attempting to establish that the freedom to abort was rooted in this Nation's tradition."). Despite the tension between these cases, the Court has reaffirmed the rights recognized in both *Roe* and *Griswold* since *Glucksberg*. *Lawrence*, 539 U.S. at 564 (citing holding of *Griswold* and Roe with approval); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (reaffirming *Roe*).

In any event, I conclude that *Glucksberg* is not instructive because that case involved the question whether a right to engage in certain conduct (refuse medical treatment) should be expanded to include a right to engage in different conduct (commit suicide), "two acts [that] are widely and reasonably regarded as quite distinct." *Id.* at 725. In this case, the conduct at issue is exactly the same as that already protected: getting married. The question is whether the scope of that right may be restricted depending on *who* is exercising the right.

Both *Lawrence* and *Loving* support a view that the state cannot rely on a history of exclusion to narrow the scope of the right. When the Supreme Court decided those cases, there had been a long history of states denying the rights being asserted. Although the trend was moving in the other direction, many states still prohibited miscegenation in 1967 and many still prohibited homosexual sexual conduct in 2003. *Lawrence*, 539 U.S. at 573 (noting that 13 states retained sodomy laws); *Loving*, 388 U.S. at 7 (noting that 16 states had anti-miscegenation laws). *See also* Andrew Sullivan, *Same–Sex Marriage: Pro and Con* Introduction xxv (Vintage 2004) (in 1968, one year *after Loving*, 72 percent of Americans disapproved of interracial marriages); Michael Klarman, *Courts, Backlash and the Struggle for Same–Sex Marriage* Introduction i (Oxford University Press 2012) (when Court decided *Brown v. Board of Education*, 21 states required or permitted racial segregation in public schools).

In both *Loving* and *Lawrence*, proponents of the laws being challenged relied on this history of exclusion as evidence that the scope of the right should not include the conduct at issue. *Bowers*, 478 U.S. at 211 (Blackmun, J., dissenting) (In *Loving*, "defenders of the challenged statute relied heavily on the fact that when the Fourteenth Amendment was ratified, most of the States had similar prohibitions."); *Lawrence*, 539 U.S. at 594–95 (Scalia, J., dissenting) ("[T]he only relevant point is that [sodomy] was criminalized—which suffices to establish that homosexual sodomy is not a right deeply rooted in our Nation's history and tradition.") (internal quotations omitted). In fact, in *Bowers*, 478 U.S. at 192, the Court itself relied on the fact that laws against sodomy had "ancient roots." However, in both *Lawrence* and *Loving*, the Supreme Court held that history was not dispositive, particularly in light of more recent changes in law and society. *Lawrence*, 539 U.S. at 571–72 ("[There

is] an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.") (internal quotations and alterations omitted); *Casey*, 505 U.S. at 847–48 ("Interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*.").

***18** Past practices cannot control the scope of a constitutional right. If the scope of the right is so narrow that it extends only to what is so well-established that it has never been challenged, then the right serves to protect only conduct that needs no protection. *Casey*, 505 U.S. at 847 (It is "tempting ... to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified.... But such a view would be inconsistent with our law."). Thus, the scope of the right must be framed in neutral terms to prevent arbitrary exclusions of entire classes of people. In this way, courts remain true to their "obligation ... to define the liberty of all [rather than] mandate [their] own moral code." *Id.* at 850.

d. "Definition" of marriage

Finally, amici attempt to distinguish *Loving* on the ground that sex, unlike race, "go[es] to the essentials of what marriage means." Amici Br., dkt. # 109, at 17 n.3. *See also id.* at 11 (opposite-sex requirement "has always been the universal essential element of the marriage definition"). This sort of "definitional" argument against marriage between same-sex couples was prominent in many of the early cases, in which courts said that the right to marry was not implicated because it simply was "impossible" for two people of the same sex to marry. *Baker*, 191 N.W.2d at 187 ("But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky.Ct.App.1973) ("In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage."); *Singer v. Hara*, 522 P.2d 1187, 1191 (Wash.Ct.App.1974) ("The operative distinction [between interracial marriage and same-sex marriage] lies in the relationship which is described by the term 'marriage' itself, and that relationship is the legal union of one man and one woman."); *Adams v. Howerton*, 486 F.Supp. 1119, 1122 (C.D.Cal.1980) ("The term 'marriage' ... necessarily and exclusively involves a contract, a status, and a relationship between persons of different sexes."); *Dean*, 653 A.2d at 361 (Terry, J., concurring) ("same-sex 'marriages' are legally and factually—i.e., definitionally—impossible").

Although amici try to rely on the inherent "nature" of marriage as a way to distinguish anti-miscegenation laws from Wisconsin's marriage amendment, the argument simply reveals another similarity between the objections to interracial marriage and amici's objections to same-sex marriage. In the past, many believed that racial mixing was just as unnatural and antithetical to marriage as amici believe homosexuality is today. *Wolfe v. Georgia Railway & Electric Co.*, 58 S.E. 899, 902–03 (Ga.1907) (stating that "there is a universally recognized distinction between the races" and that miscegenation is "unnatural" and "productive of evil, and evil only"); *Kinney v. Commonwealth*, 71 Va. 858, 869 (1878) (interracial marriage "should be prohibited by positive law" because it is "so unnatural that God and nature seem to forbid" it); *Lonas v. State*, 50 Tenn. (3 Heisk) 287, 310 (1871) ("The laws of civilization demand that the races be kept apart."). This view about interracial marriage was repeated by the trial court in *Loving*, 388 U.S. at 3 ("Almighty God created the races white, black, yellow, malay and red, and he placed them on

separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.").

***19** Mildred Loving herself, one of the plaintiffs in *Loving*, saw the parallel between her situation and that of same-sex couples. Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and the Constitution* 140 (Oxford University Press 2010) (quoting Mildred Loving as stating that "[t]he majority believed ... that it was God's plan to keep people apart and that the government should discriminate against people in love" but that she believes that "all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry"). Although amici may believe that a particular sex is more "essential" to marriage than a particular race, this may reveal nothing more than amici's own views about what seems familiar and natural. *Cf.* John Stuart Mill and Harriet Taylor Mill, "The Subjection of Women," *included in* John Stuart Mill, *On Liberty and Other Writings* 129 (Stefan Collini ed., Cambridge University Press 1989) ("Was there ever any domination which did not appear natural to those who possessed it?").

Even if I assume that amici are correct that the condemnation against miscegenation was not as "universal" as it has been against same-sex marriage, the logical conclusion of amici's argument suggests that the Supreme Court would have been compelled to uphold bans on interracial marriage if the opposition to them had been even stronger or more consistent. Of course, the Court's holding in *Loving* did not rest on a "loophole" that interracial marriage had been legal in some places during some times.

A second flaw in defendants' argument is that it is circular and would allow a state to exclude a group from exercising a right simply by manipulating a definition. Civil marriage is a *legal* construct, not a biological rule of nature, so it can be and has been changed over the years; there is nothing "impossible" about defining marriage to include same-sex couples, as has been demonstrated by the decisions of a number countries and states to do just that.

Amici say that opposite-sex marriage reflects "biological and social realities," Amici's Br., dkt. # 109, at 3, but they do not explain what that means. To the extent amici are referring again to procreation, I have discussed that issue above and need not address it again. To the extent they are referring to stereotypically masculine and feminine roles that men and women traditionally have held in marriage, that is not a legitimate basis for limiting the scope of the right. *United States v. Virginia*, 518 U.S. 515, 541–42 (1996) ("State actors may not rely on overbroad generalizations [about the sexes] to make judgments about people that are likely to perpetuate historical patterns of discrimination."); *Goodridge*, 798 N.E.2d at 965 n.28 (rejecting argument "that men and women are so innately and fundamentally different that their respective 'proper spheres' can be rigidly and universally delineated"). Although the Supreme Court has acknowledged that there are "[i]nherent differences between men and women," the state may not rely on those differences to impose "artificial constraints on an individual's opportunity." *Virginia*, 518 U.S. at 533–34. I see no reason why that principle should apply any differently in the context of marriage. Accordingly, I conclude that the right to marry protected by the Constitution includes same-sex couples.

2. *Significant interference*

***20** The next question under *Zablocki* is whether Wisconsin "significantly interferes" with plaintiffs' right to marry. It seems obvious that it does because Wisconsin law prohibits plaintiffs from entering a marriage relationship that will be meaningful for them. *Id.* at 403–04 (Stevens, J., concurring) ("A classification based on marital status is fundamentally different from a classification which determines who may lawfully enter into the marriage relationship."). *Cf. Perez v. Lippold,198* P.2d 17, 25 (Cal.1948) (un-

der anti-miscegenation law, "[a] member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable"). Even defendants do not suggest that marrying someone of the opposite sex is a viable option for plaintiffs. Thus, the practical effect of the law is to impose an absolute ban on marriage for plaintiffs. *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009) ("[T]he right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex is no right at all" because it would require that person to "negat[e] the very trait that defines gay and lesbian people as a class."); Andrew Sullivan, *Virtually Normal* 44 (Vintage Books 1995) (ban on same-sex relationships bars gay persons "from the act of the union with another" that many believe "to be intrinsic to the notion of human flourishing in the vast majority of human lives").

Neither defendants nor amici argue that domestic partnerships, which are available to both same-sex and opposite-sex couples under Wis. Stat. chapter 770, are an adequate substitute for marriage, such that the marriage ban does not "significantly interfere" with plaintiffs' rights, so I need not consider that question. However, most courts considering the issue have found that domestic partnerships and civil unions do not cure the constitutional injury because, even if the tangible benefits of a domestic partnership are similar to marriage, creating a "separate but equal" institution still connotes a second-class status. *E.g.*, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 994 (N.D.Cal.2010); Varnum, 763 N.W.2d at 906–07; *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 412 (Conn.2008); *Marriage Cases*, 183 P.3d at 445 (Cal.2008); *Opinions of the Justices*, 802 N.E.2d at 571. *But see Sevcik*, 911 F.Supp.2d at 1015 ("The State has not crossed the constitutional line by maintaining minor differences in civil rights and responsibilities that are not themselves fundamental rights comprising the constitutional component of the right to marriage, or by reserving the label of 'marriage' for one-man-one-woman couples in a culturally and historically accurate way.").

The only issue raised by defendants about the significance of the state's interference relates to the plaintiffs who were married legally in other states. Defendants say that Wisconsin law does not interfere with those plaintiffs' marriage rights because Wisconsin has done nothing to invalidate their marriages or to deprive them of benefits that they could receive from the state where they were married.

***21** This argument is bewildering. Defendants acknowledge that Wisconsin "refuses to recognize same-sex marriages lawfully contracted in other jurisdictions," Dfts.' Br., dkt. # 102, at 29, which means that the plaintiffs married in other states are deprived of any state rights, protections or benefits related to marriage so long as they reside in Wisconsin. I have no difficulty concluding that such a deprivation qualifies as "significant interference" under *Zablocki*. *De Leon*, 975 F.Supp.2d 632 (holding that state's refusal to recognize out-of-state marriage interferes with plaintiffs' right to marry); *Obergefell v. Wymyslo*, 962 F.Supp.2d 968 (S.D.Ohio 2013) (same). *See also Baskin v. Bogan*, 1:14–CV–00355–RLY, 2014 WL 1814064 (S.D.Ind. May 8, 2014) (granting preliminary injunction on claim that state's refusal to recognize out-of-state marriage interferes with plaintiffs' right to marry).

In sum, I conclude that Wisconsin's marriage amendment and the Wisconsin statutes defining marriage as requiring a "husband" and a "wife" significantly interfere with plaintiffs' right to marry, so the laws must be supported by "sufficiently important state interests" that are "closely tailored to effectuate only those interests," *Zablocki*, 434 U.S. at 388, in order to survive constitutional scrutiny. However, because this case is likely to be appealed, before I consider the state's asserted interests for these laws, I will consider plaintiffs' alternative argument that they are entitled to heightened protection under the equal

protection clause, in the event the Court of Appeals for the Seventh Circuit disagrees with my conclusion regarding the scope of plaintiffs' rights under the due process clause.

B. *Equal Protection*

In addition to placing limits on state deprivations of individual liberty, the Fourteenth Amendment says that no state may "deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause "require[s] the state to treat each person with equal regard, as having equal worth, regardless of his or her status." *Nabozny v. Podlesny*, 92 F.3d 446, 456 (7th Cir.1996). Stated another way, it "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 300 (1990) (Scalia, J. concurring). "Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." *Railway Express Agency v. People of State of New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

Although the text of the equal protection clause does not distinguish among different groups or classes, the Supreme Court has applied different standards of review under the clause, depending on the type of classification at issue. Most classifications "must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commcations, Inc.*, 508 U.S. 307, 313 (1993). Generally, under a rational basis review, the state has "no obligation to produce evidence" and "courts are compelled ... to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe by Doe*, 509 U.S. 312, 320–21 (1993).

***22** However, under some circumstances, the Supreme Court has applied a heightened standard of review. For "suspect" classifications, such as race, alienage and national origin, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 & n.4 (1976), the court applies "strict scrutiny," under which the government must show that the classification is "narrowly tailored" to achieve a "compelling" interest. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 720 (2007). With respect to a small number of other classifications, such as sex and legitimacy (often referred to as "quasi-suspect" classifications), the Court has applied what it calls intermediate scrutiny, under which the classifications must be "substantially related" to the achievement of an "important governmental objective." *Virginia*, 518 U.S. at 524.

In this case, plaintiffs contend that some form of heightened scrutiny should apply because the marriage amendment discriminates on the basis of sex and sexual orientation. I will address both of these contentions in turn.

1. *Sex discrimination*

Plaintiffs identify two theories of sex discrimination. The first is straightforward: if each plaintiff was to choose a marriage partner of the opposite-sex, he or she would be permitted to marry in Wisconsin. Therefore, plaintiffs say, it is because of their sex that they cannot marry. Plaintiffs' second theory is more nuanced and relies on the concept of sex stereotyping. In particular, plaintiffs say that Wisconsin's ban on marriage between same-sex couples "perpetuates and enforces stereotypes regarding the expected and traditional roles of men and women, namely that men marry and create families with women, and women marry and create families with men." Plts.' Br., dkt. # 71, at 18.

With respect to the first theory of sex discrimination, plaintiffs analogize their situation to the plaintiffs in *Loving*, who were prohibited from marrying because of the race of their partner. The state

argued in *Loving* that the anti-miscegenation law was not discriminatory because it applied to both whites and blacks, but the Supreme Court rejected that argument, stating that "we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Loving*, 388 U.S. at 7–8. *See also McLaughlin v. State of Florida*, 379 U.S. 184, 191 (1964) (statute prohibiting interracial cohabitation is unconstitutional, even though it penalized both whites and blacks; "[j]udicial inquiry under the Equal Protection Clause ... does not end with a showing of equal application among the members of the class defined by the legislation"). Plaintiffs argue that the same reasoning should apply in this case. In other words, plaintiffs believe that the same-sex marriage ban discriminates on the basis of sex, even though it applies equally to both men and women, because it draws a line according to sex.

***23** In the first case resolved in favor of same-sex couples seeking to marry, the court adopted this theory, even though the plaintiffs had not argued it initially. *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw.1993). Since then, however, the sex discrimination theory has been rejected by most courts to consider it, even those ruling in favor of the plaintiffs on other grounds. *E.g.*, *Geiger v. Kitzhaber*, 6:13–CV–01834–MC, 2014 WL 2054264, at *7 (D.Or. May 19, 2014); *Latta*, 2014 WL 1909999, at *15; *Bishop*, 962 F.Supp.2d at 1286–87; Sevcik, 911 F.Supp.2d at 1005; *Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1098–99 (D.Haw.2012); *Griego v. Oliver*, 2014–NMSC–003, 316 P.3d 865, 880; *Kerrigan*, 957 A.2d at 509; *Marriage Cases*, 183 P.3d at 438; *Conaway v. Deane*, 4932 A.2d 571, 601–02 (Md.2007); *Hernandez*, 855 N.E.2d at 10–11. *But see Kitchen*, 961 F.Supp. at 1206 ("[T]he court finds that the fact of equal application to both men and women does not immunize Utah's Amendment 3 from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex."); *Perry v. Schwarzenegger*, 704 F.Supp.2d at 996 ("Sexual orientation discrimination can take the form of sex discrimination."); *Brause v. Bureau of Vital Statistics*, 3AN–95–6562 CI, 1998 WL 88743, *6 (Alaska Super.Ct. Feb. 27, 1998) ("That this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.").

Although the reasoning of the courts rejecting the theory has varied, the general view seems to be that a sex discrimination theory is not viable, even if the government is making a sex-based classification with respect to an individual, because the intent of the laws banning same-sex marriage is not to suppress females or males as a class. *E.g.*, *Sevcik*, 911 F.Supp.2d at 1005 ("[B]ecause it is homosexuals who are the target of the distinction here, the level of scrutiny applicable to sexual-orientation-based distinctions applies."). In other words, courts view this theory as counterintuitive and legalistic, an attempt to "bootstrap" sexual orientation discrimination into a claim for sex discrimination.

With respect to plaintiffs' second theory, there is support in the law for the view that sex stereotyping is a form of sex discrimination. *Virginia*, 518 U.S. at 541–42 ("State actors controlling gates to opportunity ... may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females.") (internal quotations omitted); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matc[h] the stereotypes associated with their group."). *See also Doe by Doe v. City of Belleville, Illinois*, 119 F.3d 563, 581 (7th Cir.1997)("A woman who is harassed ... because [she] is perceived as unacceptably 'masculine' is harassed 'because of' her

sex.... In the same way, a man who is harassed because ... he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex.") (citations omitted). *But see Hamm v. Weyauwega Milk Products, Inc .*, 332 F.3d 1058, 1068 (7th Cir.2003) (Posner, J., concurring) (" 'Sex stereotyping' should not be regarded as a form of sex discrimination, though it will sometimes ... be evidence of sex discrimination."). Some commentators have argued that sexual orientation discrimination should be seen as the ultimate form of sex stereotyping because it is grounded in beliefs about appropriate gender roles, *e.g.*, Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L.Rev. 187 (1988), but plaintiffs have not cited any courts that have adopted that theory and I am not aware of any.

***24** Plaintiffs' arguments about sex discrimination are thought-provoking enough to have caught the interest of at least one Supreme Court justice. Oral argument, *Hollingsworth v. Perry*, No. 12–144, 2013 WL 1212745, at * 13 (statement of Kennedy, J.) ("Do you believe [that a ban on same-sex marriage] can be treated as a gender-based classification? It's a difficult question that I've been trying to wrestle with it."). However, neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has embraced either theory asserted by plaintiffs. With respect to the first theory, the court of appeals assumed in a recent case that a sex-based classification may be permissible if it imposes comparable burdens on both sexes. *Hayden ex rel. A.H. v. Greensburg Community School Corp.*, 743 F.3d 569, 581 (7th Cir.2014) ("Sex-differentiated standards consistent with community norms may be permissible to the extent they are part of a comprehensive, evenly-enforced grooming code that imposes comparable burdens on both males and females alike."). With respect to the second theory, the court has stated that there is "a considerable overlap in the origins of sex discrimination and homophobia," but the court declined to "go so far" as "to conclude that anti-gay bias should, in fact, be understood as a form of sex discrimination." *Doe*, 119 F.3d at 593 n.27. The Supreme Court has not discussed either theory as it relates to sexual orientation.

Because of the uncertainty in the law and because I am deciding the case in plaintiffs' favor on other grounds, I decline to wade into this jurisprudential thicket at this time. However, the court of appeals' statement that sex and sexual orientation are related provides some support for a view that, like sex discrimination, sexual orientation discrimination should be subjected to heightened scrutiny.

2. *Sexual orientation discrimination*

a. Supreme Court guidance

The Supreme Court has never decided explicitly whether heightened scrutiny should apply to sexual orientation discrimination. *Lee v.. Orr*, 13–CV–8719, 2013 WL 6490577 n.1 (N.D.Ill.Dec. 10, 2013) ("[T]he Supreme Court has yet to expressly state the level of scrutiny that courts are to apply to claims based on sexual orientation."). In *Romer*, 517 U.S. at 632, in which the Court invalidated a state constitutional amendment because it discriminated on the basis of sexual orientation, the Court ignored the question whether heightened scrutiny should apply, perhaps because it was unnecessary in light of the Court's conclusion that the law in dispute "lack[ed] a rational relationship to legitimate state interests." The Court did not discuss the standard of review in *Windsor* either.

Despite the lack of an express statement from the Supreme Court, some courts and commentators have argued that the Court's analyses in *Romer* and especially *Windsor* require a conclusion that the Court, in practice, is applying a higher standard than rational basis. For example, in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 480–81 (9th Cir.2014), the court considered the standard of review

to apply to sexual orientation discrimination in the context of jury selection. The court stated that "*Windsor* review is not rational basis review. In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation." *Id. See also* Evan Gerstmann, Same–Sex Marriage and the Constitution, 19 (2d ed. Cambridge University Press 2008) ("Some scholars, including this author, have argued that the *Romer* Court actually applied a level of scrutiny somewhat greater than rational basis review" because "[t]he Court seemed unusually skeptical of [the state's] professed reasons" for [the law]."). This conclusion is consistent with Justice Scalia's dissenting opinion in *Windsor,* 133 S.Ct. at 2706, in which he stated that "the Court certainly does not apply anything that resembles [the rational-basis] framework."

***25** In *SmithKline,* 740 F.3d at 981–83, the court of appeals relied on four factors to conclude that *Windsor* applied heightened scrutiny: (1) the Supreme Court did not consider "conceivable" justifications for the law not asserted by the defenders of the law; (2) the Court required the government to "justify" the discrimination; (3) the Court considered the harm that the law caused the disadvantaged group; and (4) the Court did not afford the law a presumption of validity. Finding all of these things inconsistent with rational basis review, the court of appeals concluded that the Supreme Court must have been applying some form of heightened scrutiny.

I agree with the court in *SmithKline* that the Supreme Court's analysis in *Windsor* (as well as in *Romer)* had more "bite" than a rational basis review would suggest. In fact, in Justice O'Connor's concurrence in *Lawrence,* 539 U.S. at 580, she acknowledged that the Court conducted "a more searching inquiry" in *Romer* than it had in the ordinary case applying rational basis review.

It may be that *Windsor's* silence is an indication that the Court is on the verge of making sexual orientation a suspect or quasi-suspect classification. *Cf. Frontiero v. Richardson,* 411 U.S. 677, 683 (1973) (plurality opinion) (stating for first time that sex discrimination should receive heightened scrutiny and relying on previous case in which Court had "depart[ed] from a 'traditional' rational-basis analysis with respect to [a] sex-based classificatio[n]" but Court did not say expressly in previous case that it was applying heightened standard of review). Alternatively, it may be that *Romer* and *Windsor* suggest that "[t]he hard edges of the tripartite division have ... softened," and that the Court has moved "toward general balancing of relevant interests ." Cass Sunstein, *Foreword: Leaving Things Undecided,* 110 Harv. L.Rev. 4, 77 (1996). However, in the absence of a clear statement from the Court regarding the standard of review it was applying, it is difficult to rely on those cases as authority for applying heightened scrutiny to sexual orientation discrimination. Accordingly, I will consider next whether the Court of Appeals for the Seventh Circuit has provided definitive guidance.

b. Guidance from the Court of Appeals for the Seventh Circuit

Defendants argue that circuit precedent prohibits this court from applying heightened scrutiny, but I disagree. In *Ben–Shalom v. Marsh,* 881 F.2d 454, 464 (7th Cir.1989), the court of appeals applied rational basis review to a law banning gays in the military, but in *Nabozny,* 92 F.3d at 457–58, the court stated that *Ben–Shalom's* holding was limited to the military context. This makes sense in light of the general rule that courts must be more deferential to the government in matters of national security. *E.g., Rostker v. Goldberg,* 453 U.S. 57, 68 (1981) (upholding sex-based classification in military context). In *Nabozny,* a case involving allegations that school officials failed to protect a student from harassment because of a perception that he was gay, the court stated that it "need not consider whether homosexuals are a suspect or

quasi-suspect class" because, viewing the facts in the light most favorable to the plaintiff as required on a motion for summary judgment, the defendants' actions lacked any rational basis. *Id.* at 458.

***26** Since *Nabozny*, the court of appeals has not engaged in any further analysis of the question whether sexual orientation discrimination should be subjected to heightened scrutiny. In *Schroeder v. Hamilton School District*, 282 F.3d 946, 950–51 (7th Cir.2002), the court stated that "homosexuals do not enjoy any heightened protection under the Constitution," but that statement was dicta because the court did not rely on the standard of review to decide the case. Instead, the court held that the plaintiff had failed to prove that the defendants treated him less favorably because of his sexual orientation. *Schroeder*, 282 F.3d at 956 ("Schroeder failed to demonstrate that the defendants treated his complaints of harassment differently from those lodged by non-homosexual teachers, that they intentionally discriminated against him, or acted with deliberate indifference to his complaints because of his homosexuality.").

"[D]ictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject." *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir.1988). As a general rule, district courts should be guided by the views of the court of appeals or the Supreme Court, even when those views are expressed in dicta, *Reich v. Continental Casualty Co.*, 33 F.3d 754, 757 (7th Cir.1994), but, when dicta is not supported by reasoning, its persuasive force is greatly diminished. *Sutton v. A .O. Smith Co.*, 165 F.3d 561, 564 (7th Cir.1999); *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir.1998); *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1176 (7th Cir.1990). In *Schroeder*, the court did not provide any reasoning for its conclusion that sexual orientation discrimination is not entitled to heightened scrutiny; instead the court simply cited *Romer*, 517 U.S. at 634–35, which did not address the issue, and *Bowers*, 478 U.S. at 196, which was overruled a year after *Schroeder* in *Lawrence*. *Cf. Kerrigan*, 957 A.2d at 468 (2008) (concluding that sexual orientation discrimination is subject to heightened scrutiny, despite case law to contrary, because those cases "rely so heavily on *Bowers* "). Accordingly, I conclude that *Schroeder* does not resolve the question of the appropriate standard of review to apply to discrimination against gay persons.

c. Factors relevant to determining status as suspect or quasi-suspect class

Because neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has provided definitive guidance on whether sexual orientation discrimination requires heightened scrutiny, I must make that determination on my own. Other courts making the same determination have identified four factors that the Supreme Court has discussed, often in dicta, as relevant to the analysis: (1) whether the class has been subjected to a history of discrimination, *Murgia*, 427 U.S. at 313; (2) whether individuals in the class are able to contribute to society to the same extent as others, *Cleburne*, 473 U.S. at 440–41; (3) whether the characteristic defining the class is "immutable," *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); and (4) whether the class is "politically powerless." *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). *But see Virginia*, 518 U.S. at 568 (Scalia, J., dissenting) ("We have no established criterion for 'intermediate scrutiny' either, but essentially apply it when it seems like a good idea to load the dice."). Since *Windsor*, all the courts to consider the issue have concluded that each of the factors applies to sexual orientation discrimination. *E.g.*, *Whitewood v. Wolf*, 1:13–CV–1861, —— F.Supp.2d ——, 2014 WL 2058105, at *14 (M.D.Pa. May 20, 2014); *De Leon*, 975 F.Supp.2d at 650–51; *Bassett v. Snyder*, 951 F.Supp.2d 939, 960 (E.D.Mich.2013).

***27** Defendants do not challenge plaintiffs' contentions that gay persons have been subjected to a history of discrimination and that sexual orientation does not impair an individual's ability to contribute to society, so I see no reason to repeat the analyses of the

many courts that have reached the same conclusion. *E.g.*, *Windsor v. United States*, 699 F.3d 169, 182 (2d Cir.2012); *De Leon*, 975 F.Supp.2d at 650–51; *Pedersen v. Office of Personnel Management*, 881 F.Supp.2d 294, 316 (D.Conn.2012); *Golinski v. U.S. Office of Personnel Management*, 824 F.Supp.2d 968, 986 (N.D .Cal.2012); *Perry*, 704 F.Supp.2d at 1002; *Varnum*, 763 N.W.2d at 889; *Kerrigan*, 957 A.2d at 435 (2008). In fact, I am not aware of *any* cases in which a court concluded that being gay hinders an individual's ability to contribute to society.

With respect to immutability, defendants do not directly challenge the view that it applies to sexual orientation, but instead argue in a footnote that the authorities plaintiffs cite do not support their position. Dfts.' Br., dkt. # 102, at 40 n.10. With respect to political powerlessness, defendants deny that it applies to gay persons, pointing to various statutes in Wisconsin and around the country that prohibit sexual orientation discrimination in contexts other than marriage, such as employment. Dfts.' Br., dkt. # 102, at 40–41. In addition, they cite public opinion polls suggesting that attitudes about homosexuality have become more positive in recent years. Most courts concluding that sexual orientation discrimination is not subject to heightened scrutiny have relied on a similar argument about political power. *E.g.*, *Sevcik*, 911 F.Supp.2d at 1008 ("[The political success] the homosexual-rights lobby has achieved ... indicates that the group has great political power. ... In 2012 America, anti-homosexual viewpoints are widely regarded as uncouth.").

I disagree with defendants that heightened scrutiny is inappropriate, either because of any doubts regarding whether sexual orientation is "immutable" or because of any political successes gay persons have had. In applying the four factors to a new class, it is important to consider the underlying reasons for applying heightened scrutiny and to look at the classes that already receive heightened scrutiny to see how the factors apply to them.

With respect to immutability, the Supreme Court has applied heightened scrutiny to discrimination on the basis of alienage, *e.g.*, *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971), even though aliens can become citizens. *Sugarman*, 413 U.S. at 657 (Rehnquist, J., dissenting) ("[T]here is a marked difference between a status or condition such as illegitimacy, national origin, or race, which cannot be altered by an individual and the 'status' [that can be] changed by ... affirmative acts."). The Court also applies heightened scrutiny to discrimination on the basis of religion, *e.g.*, *Larson v. Valente*, 456 U.S. 228 (1982), even though religion is something that a person chooses. (Although most religious discrimination claims arise under the First Amendment, it is likely that the same standard would apply under the equal protection clause. *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("[T]he Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.").) Even a person's gender is not written in stone. *E.g.*, *Glenn v. Brumby*, 724 F.Supp.2d 1284, 1289 (N.D.Ga.2010) (discussing process leading up to sex reassignment surgery).

***28** Rather than asking whether a person *could* change a particular characteristic, the better question is whether the characteristic is something that the person *should be required* to change because it is central to a person's identity. Of course, even if one could change his or her race or sex with ease, it is unlikely that courts (or virtually anyone else) would find that race or sex discrimination is any more acceptable than it is now.

In *Lawrence*, 539 U.S. at 577, the Supreme Court

found that sexual expression is "an integral part of human freedom" and is entitled to constitutional protection, which supports a conclusion that the law may not require someone to change his or her sexual orientation. Further, sexual orientation has been compared to religion on the ground that both "often simultaneously constitut[e] or infor[m] a status, an identity, a set of beliefs and practices, and much else besides." *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez,* 561 U.S. 661, 130 S.Ct. 2971, 2995 n.1 (2010) (Stevens, J., concurring). *See also* Martha Nussbaum, *From Disgust to Humanity: Sexual Orientation & Constitutional Law* 39 (Oxford University Press 2010) (like religion, sexual orientation "goes to the heart of people's self-definition, their search for identity and self-expression"). For this reason, I agree with those courts that have concluded that, regardless whether sexual orientation is "immutable," it is "fundamental to a person's identity," *De Leon,* 975 F.Supp.2d at 651, which is sufficient to meet this factor. *Bassett,* 951 F.Supp.2d at 960; *Griego,* 316 P.3d at 884.

With respect to political powerlessness, it seems questionable whether it is really a relevant factor. When the Supreme Court has mentioned political power, it has been only to include it in a list of other reasons for denying a request for heightened scrutiny. *E .g., Bowen,* 483 U.S. at 603; *Cleburne,* 473 U.S. at 445; *Murgia,* 427 U.S. 307 at 313–14. Defendants cite no case in which the Supreme Court has determined that it is a dispositive factor. On a practical level, it would be challenging to apply because it would suggest that classes could fall in and out of protected status depending on some undetermined level of political success, an idea for which the Court has never even hinted support. *Regents of University of California v. Bakke,* 438 U.S. 265, 298 (1978) (opinion of Powell, J.) (rejecting view that equal protection clause should be "hitch[ed] ... to ... transitory considerations [that] vary with the ebb and flow of political forces").

Perhaps most telling is that almost none of the classifications that receive heightened scrutiny, including race or sex, could satisfy this factor if the test were whether the group has had any political success. *Marriage Cases,* 183 P.3d at 443. Particularly because discrimination against white citizens is subjected to strict scrutiny, *e.g., City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989), it is difficult to understand why a group's political power should be determinative.

***29** To the extent that "political powerlessness" is an appropriate factor, I conclude that the question is best framed as whether the class is inherently vulnerable in the context of the ordinary political process, either because of its size or history of disenfranchisement. In light of the fact that gay persons make up only a small percentage of the population and that there is no dispute that they have been subjected to a history of discrimination, I have no difficulty in concluding that sexual orientation meets this factor as well. *Windsor,* 699 F.3d at 184; *Pedersen,* 881 F.Supp.2d at 332.

In any event, a review of the various classifications that receive heightened scrutiny (race, sex, alienage, legitimacy) reveals a common factor among them, which is that the classification is seldom "relevant to the achievement of any legitimate state interest." *Cleburne,* 473 U.S. at 440. Under these circumstances, the classification is more likely "to reflect prejudice and antipathy," so courts should be more suspicious of the discrimination. *Id. See also Pedersen,* 881 F.Supp.2d at 319 ("The ability to contribute to society has played a critical and decisive role in Supreme Court precedent both denying and extending recognition of suspect class to other groups."). Neither defendants nor amici offer an argument that sexual orientation would not meet that standard.

Accordingly, I conclude that sexual orientation discrimination is subject to heightened scrutiny. The Supreme Court has not explained how to distinguish a

"suspect" classification from a "quasi-suspect" classification, but sexual orientation is most similar to sex among the different classifications that receive heightened protection, *Doe*, 119 F.3d at 593 n. 27. Because sex discrimination receives intermediate scrutiny and the difference between intermediate scrutiny and strict scrutiny is not dispositive in this case, I will assume that intermediate scrutiny applies, which means that defendants must show that Wisconsin's laws banning marriage between same-sex couples must be "substantially related" to the achievement of an "important governmental objective," *Virginia*, 518 U.S. at 524, to survive scrutiny under the equal protection clause.

3. *Other considerations relevant to the standard of review*

In cases involving both suspect classes as well as other groups of people, the Supreme Court has taken into account the nature and severity of the deprivation at issue, particularly when it seems to threaten principles of equal citizenship or imposes a stigma on a particular class. *Cleburne*, 473 U.S. at 448 (striking down law that restricted where mentally disabled, a nonsuspect class, could live); *Plyler v. Doe*, 457 U.S. 202, 223–24, (1982) (in equal protection case involving nonsuspect class's access to public education, noting that "[p]ublic education is not a 'right' granted to individuals by the Constitution. But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation" and that, as a result of a denial of education, the"[t]he stigma of illiteracy will mark [the uneducated children] for the rest of their lives"); *Brown*, 347 U.S. at 494 (segregation "generates a feeling of inferiority as to [black students'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone."). *See also Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in the judgment in part and dissenting in part) ("I have long believed the level of scrutiny employed in an equal protection case should vary with the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."). This focus on stigma and equal citizenship makes sense because one purpose of the equal protection clause is to prohibit "stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984).

***30** The Supreme Court's focus on the nature and severity of the deprivation is particularly apparent in its more recent cases touching on sexual orientation. In *Romer*, 517 U.S. at 627, 629, 631, 635, the Court noted that the state constitutional amendment at issue (which prohibited municipalities from enacting ordinances that banned sexual orientation discrimination) imposed "severe consequence[s]," "special disabilit[ies]" and "immediate, continuing, and real injuries" on gay persons and no one else and that the amendment "put [them] in a solitary class with respect to transactions and relations in both the private and governmental spheres." The Court contrasted the challenged law with differential treatment the Court had upheld in the past regarding economic activities such as advertising and operating a pushcart. *Id.* at 632. In part because of the nature of the harm, the Court concluded that the state law amounted to "class legislation" and "a classification of persons undertaken for its own sake." *Id.* at 635. The Court quoted the famous dissenting opinion by Justice Harlan in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), for the proposition that the Constitution "neither knows nor tolerates classes among citizens." *Id.* at 623.

Although the Supreme Court did not decide *Lawrence* under the equal protection clause, it continued to use similar language. For example, the Court noted that the sodomy law at issue "demeans the lives of homosexual persons," "invit[es] ... discrimination [against gay persons] both in the public and in the private spheres" and "imposes" a "stigma" on them. *Lawrence*, 539 U .S. at 575.

Finally, in *Windsor,* 133 S.Ct. at 2693, the Supreme Court concluded that, by denying federal benefits to same-sex couples married under the laws of a particular state, the "practical effect [was] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." The Court repeated the theme of stigma and second-class status multiple times. *Id.* at 2694 (DOMA "tells [same-sex] couples [married under state law], and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects."); *id.* at 2696 ("DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others."); *id.* (effect of DOMA is to treat some persons as "living in marriages less respected than others."). Throughout the decision, the Court emphasized that DOMA imposes a disability on same-sex couples, demeans them, violates their dignity and lowers their status. *Id.* at 2692, 2695.

***31** Although the Court did not explain in *Romer, Lawrence* or *Windsor* how these considerations affected the standard of review, it seems clear that they were important to the decisions. Thus, even if one assumes that same-sex marriage does not fall within the right recognized in *Loving* and other cases, this does not mean that courts may ignore the nature and severity of the deprivation that a ban imposes on those couples.

Of course, the tangible benefits that marriage provides a couple are numerous. However, many would argue that the intangible benefits of marriage are equally important, if not more so. Recognizing this, some courts have found that the denial of marriage rights to same-sex couples necessarily is a denial of equal citizenship. *E.g., Goodridge,* 798 N.E.2d at 948. Others have concluded that the significance of the deprivation must be incorporated into the standard of review. *Baker,* 744 A.2d at 884 ("The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned."). I agree with both conclusions.

In sum, I conclude that Wisconsin's marriage amendment and the other laws at issue are subject to heightened scrutiny under both the due process clause and the equal protection clause. First, because I have concluded that the marriage ban significantly interferes with plaintiffs' right to marry under the due process clause, defendants must show that the ban furthers "sufficiently important state interests" that are "closely tailored to effectuate only those interests." *Zablocki,* 434 U.S. at 388. With respect to the equal protection clause, the marriage ban is subject to intermediate scrutiny because the ban discriminates on the basis of sexual orientation. In addition, the nature and severity of the deprivation is a relevant factor that must be considered. However, regardless whether I apply strict scrutiny, intermediate scrutiny or some "more searching" form of rational basis review under the equal protection clause, I conclude that the marriage amendment and related statutes cannot survive constitutional review.

III. EVALUATING THE ASSERTED STATE INTERESTS

The final question is whether defendants have made an adequate showing that the Wisconsin laws prohibiting same-sex marriage further a legitimate interest. Defendants and amici rely on several interests in their briefs: (1) preserving tradition; (2) encouraging procreation generally and "responsible" procreation in particular; (3) providing an environment for "optimal child rearing"; (4) protecting the institution of marriage; (5) proceeding with caution; and (6) helping to maintain other legal restrictions on mar-

riage. These interests are essentially the same as those asserted by other states in other cases around the country involving similar laws.

***32** Defendants' asserted interests also overlap substantially with the interests asserted in *Windsor* by the proponents of the Defense of Marriage Act. Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States of America v. Windsor,* No. 12–307, 2013 WL 267026 (citing interests in "providing a stable structure to raise unintended and unplanned offspring," "encouraging the rearing of children by their biological parents" and "promoting childrearing by both a mother and a father"). However, the Supreme Court did not consider these interests individually, even though the dissenting justices relied on them. *Id.* at 2718 (Alito, J., dissenting). Instead, the Court stated that "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2696. This is similar to the approach the Court took in *Loving,* 388 U .S. at 11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.").

The Court's silence raises the question whether its refusal to credit the interests asserted by the defenders of DOMA requires the same approach in this case. On its face, Windsor does not apply to state law bans on marriage between same-sex couples. *Windsor,* 133 S.Ct. at 2696 (limiting its holding to denial of federal benefits of same-sex couples married under state law); *Kitchen,* 961 F.Supp.2d at 1194 ("The *Windsor* court did not resolve this conflict in the context of state-law prohibitions of same-sex marriage."). However, as noted by Justice Scalia in his dissent, it is difficult to cabin the Court's reasoning to DOMA only. *Windsor,* 133 S.Ct. at 2709–10. If anything, the Court's concerns about the "second-class status" imposed by DOMA on same-sex couples would be *more* pronounced by a total denial of the right to marry than by the "second-tier" marriages at issue in *Windsor* that provided state but not federal benefits. Further, although *Windsor* involved a federal law rather than a state law, I am not aware of any other case in which the Court applied equal protection principles differently to state and federal government. *Buckley v. Valeo,* 424 U.S. 1, 93 (1976) ("Equal protection analysis [with respect to the federal government] in the Fifth Amendment area is the same as that under the Fourteenth Amendment [with respect to the states.]"). This may be the reason why all federal courts reviewing a ban on same-sex marriage since *Windsor* have concluded that the ban is unconstitutional.

Defendants say that *Windsor* is distinguishable, arguing that the Supreme Court relied on the "unusual character" of the discrimination at issue in that case, just as the Court did in *Romer*. In *Windsor,* 133 S.Ct. at 2693, the Court stated that DOMA was unusual because it departed from the federal government's ordinary practice of deferring to the states on marriage issues. In *Romer,* 517 U.S. at 632 the Court relied on the "sheer breadth" of the discriminatory law.

***33** Although defendants are correct that the facts in this case are not the same as *Windsor* or *Romer,* there is a colorable argument that Wisconsin's marriage amendment is "unusual" in other ways. First, the amendment represents a rare, if not unprecedented, act of using the Wisconsin Constitution to *restrict* constitutional rights rather than expand them and to require discrimination against a particular class. *Cf.* Akhil Amar, *America's Unwritten Constitution* 451, 453 (Basic Books 2012) ("[An amendment] to restrict the equality rights of same-sex couples should be viewed with special skepticism because the amendmen[t] would do violence to the trajectory of the American constitutional project over the past two hundred years.... [Such an] illiberal amendment would be [a] radical departur[e] from our national narrative thus far."). Particularly because Wisconsin statutory law already limited marriage to opposite-sex couples, *Phillips v. Wisconsin Personnel Commission,* 167

Wis.2d 205, 482 N.W.2d 121, 129 (Ct.App.1992), enshrining the ban in the state constitution seems to suggest that the amendment had a moral rather than practical purpose.

Second, like the constitutional amendment at issue in *Romer*, Wisconsin's ban on same-sex marriage (a) implicates a right "taken for granted by most people"; and (b) is sweeping in scope, denying same-sex couples hundreds of derivative rights that married couples have and excluding same-sex couples "from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id.* at 631.

Although there is support for a view that *Windsor* is controlling in this case, I need not resolve that question. Even if I assume that Wisconsin's ban on same-sex marriage is not "unusual" in the same sense as the laws at issue in *Romer* and *Windsor*, I conclude that defendants have failed to show that the ban furthers a legitimate state interest.

A. *Tradition*

Both defendants and amici defend Wisconsin's same-sex marriage ban on the ground of tradition. Defendants say that "[t]he traditional view of marriage—between a man and woman ...—has been recognized for millennia." Dfts.' Br., dkt. # 102, at 45. Amici go even further to state that "virtually all cultures through time" have recognized marriage "as the union of an opposite-sex couple." Amici's Br., dkt. # 109, at 3–4.

As an initial matter, defendants and amici have overstated their argument. Throughout history, the most "traditional" form of marriage has not been between one man and one woman, but between one man and *multiple* women, which presumably is not a tradition that defendants and amici would like to continue. Stephanie Coontz, *Marriage, a History* 10 (2005) ("Polygyny, whereby a man can have multiple wives, is the marriage form found in more places and at more times than any other.").

Nevertheless, I agree with amici's more general view that tradition can be important because it often "reflects lessons of experience." Amici's Br., dkt. # 109, at 7. For this reason, courts should take great care when reviewing long-standing laws to consider what those lessons of experience show. However, it is the reasons for the tradition and not the tradition itself that may provide justification for a law. *Griego*, 316 P.3d at 871–72 ("[L]egislation must advance a state interest that is separate and apart from the classification itself."); *Kerrigan*, 957 A.2d at 478–79 ("[W]hen tradition is offered to justify preserving a statutory scheme that has been challenged on equal protection grounds, we must determine whether the reasons underlying that tradition are sufficient to satisfy constitutional requirements."). Otherwise, the state could justify a law simply by pointing to it. *Varnum*, 763 N.W.2d at 898 ("When a certain tradition is used as both the governmental objective and the classification to further that objective, the equal protection analysis is transformed into the circular question of whether the classification accomplishes the governmental objective, which objective is to maintain the classification."); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 382 (2005) (Saxe, J., dissenting) ("Employing the reasoning that marriage must be limited to heterosexuals because that is what the institution has historically been, merely justifies discrimination with the bare explanation that it has always been this way."). Like moral disapproval, tradition alone proves nothing more than a state's desire to prohibit particular conduct. *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring in the judgment); *id.* at 601–02 (Scalia, J., dissenting) (" '[P]reserving the traditional institution of marriage' is just a kinder way of describing the State's moral disapproval of same-sex couples.").

***34** Although many venerable practices are part of American history, there are darker traditions as well, which later generations have rejected as denials

of equality. For example, "[r]ote reliance on historical exclusion as a justification ... would have served to justify slavery, anti-miscegenation laws and segregation." *Hernandez v. Robles,* 794 N.Y.S.2d 579, 609 (Sup.Ct.2005). Similarly, women were deprived of many opportunities, including the right to vote, for much of this country's history, often because of "traditional" beliefs about women's abilities. *E.g., Bradwell v. People of State of Illinois,* 83 U.S. 130, 141–42 (1872) (Bradley, J., concurring in the judgment) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.... The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."). With respect to marriage in particular, there was a time when "the very being or legal existence of [a] woman [was] suspended" when she married. William Blackstone, *Commentaries,* Vol. I, 442–45 (1765). In the 1870's, Elizabeth Cady Stanton went so far as to argue that marriage at that time was "slavery" for women because they were required to forfeit so many rights. Jason Pierceson, *Same–Sex Marriage in the United States* 41 (Rowman & Littlefield 2013).

The rejection of these inequalities by later generations shows that sometimes a tradition may endure because of unexamined assumptions about a particular class of people rather than because the laws serve the community as a whole. *Compare Dronenburg v. Zech,* 741 F.2d 1388, 1398 (D.C.Cir.1984) ("[C]ommon sense and common experience demonstrate" that gay officers in military "are almost certain to be harmful to morale and discipline."), *with* Jim Garamone, "Don't Ask, Don't Tell' Repeal Certified by President Obama," American Forces Press Service (July 22, 2011), *available at* http://www.defense.gov/news/newsarticle.aspx?id=64780 (visited June 6, 2014) ("The President, the chairman of the Joint Chiefs of Staff, and [the Secretary of Defense] have certified that the implementation of repeal of [restrictions on gay persons in the military] is consistent with the standards of military readiness, military effectiveness, unit cohesion and recruiting and retention of the armed forces."). For this reason, the Supreme Court has stated that the "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis," *Heller v. Doe,* 509 U.S. 312, 326 (1993), and it has "not hesitated to strike down an invidious classification even though it had history and tradition on its side." *Levy v. Louisiana,* 391 U.S. 68, 71 (1968). Thus, if blind adherence to the past is the only justification for the law, it must fail. Holmes, *The Path of the Law,* 10 Harv. L.Rev. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that ... it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

B. *Procreation*

***35** Perhaps the most common defense for restricting marriage to opposite-sex couples is that procreation is the primary purpose of marriage and that same-sex couples cannot procreate with each other. *E.g., Dean,* 1992 WL 685364 (ban on same-sex marriage justified by state's interest in "fostering, at a socially-approved point in time (i.e. during marriage), that which is essential to the very survival of the human race, namely, procreation"). *See also Kandu,* 315 B.R. at 147; *Standhardt v. Superior Court ex rel. County of Maricopa,* 77 P.3d 451, 462 (Ariz.Ct.App.2003); *Adams,* 486 F.Supp. at 1124–25; *Singer,* 522 P.2d at 1195; *Baker,* 191 N.W.2d at 187. A more recent twist on this argument is that marriage is needed to help opposite-sex couples procreate "responsibly," but same-sex couples do not have the same need. *Morrison v. Sadler,* 821 N.E.2d 15, 27 (Ind.Ct.App.2005). Defendants and amici repeat these arguments.

One problem with the procreation rationale is that defendants do not identify any reason why denying marriage to same-sex couples will encourage oppo-

site-sex couples to have children, either "responsibly" or "irresponsibly." *Geiger*, 2014 WL 2054264, at * 13; *Bishop*, 962 F.Supp.2d. at 1291. Defendants say that this argument "misses the point" because "[t]he focus under rational-basis review is whether the challenged statute rationally supports a State interest, not whether expanding the class of beneficiaries to marriage would harm the State's interest." Dfts.' Br., dkt. # 102, at 65–66 (citing *Johnson v. Robison*, 415 U.S. 361, 383 (1974) (classification will be upheld under rational basis review if "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not")). In other words, defendants seem to concede that they have no reason to believe that marriage between same-sex couples will have an adverse effect on procreation between opposite-sex couples; however, preferential treatment for opposite-sex couples is permissible because they "need" marriage to better insure that they will stay together after procreation and same-sex couples do not need such assistance because they do not procreate "accidentally."

As defendants acknowledge implicitly by citing *Johnson*, 415 U .S. 361, this argument is contingent on applying the most deferential standard of review. Because I have concluded that Wisconsin's laws banning same-sex marriage are subject to heightened scrutiny under both the due process clause and the equal protection clause, this argument is a nonstarter. Defendants identify no other situation in which a right could be denied to a class of citizens simply because of a perception by the state that the class "doesn't need" the right as much as another class. Treating such a fundamental right as just another government benefit that can be offered or withheld at the whim of the state is an indicator either that defendants fail to appreciate the implications for equal citizenship that the right to marry has or that they do not see same-sex couples as equal citizens. *Cf.* John Stuart Mill, "The Subjection of Women," *included in Classics of Moral and Political Theory* 1145 (Michael Morgan ed., 5th ed. 2011) ("[T]here are many persons for whom it is not enough that the inequality has no just or legitimate defence; they require to be told what express advantage would be obtained by abolishing it. To which let me first answer, the advantage of having the most universal and pervading of all human relations regulated by justice instead of injustice.").

***36** Further, despite the popularity of this argument in courts in other states, it is difficult to believe that Wisconsin voters and legislators were willing to go to the great effort of adopting a constitutional amendment that excluded a class of citizens from marriage simply because the voters and legislators believed that same-sex couples were so stable and responsible that marriage was unnecessary for them. Even setting aside the standard of review, "the breadth of the amendment is so far removed from th[is] particular justificatio[n] that [I] find it impossible to credit." *Romer*, 517 U.S. at 635 (interest in "conserving resources to fight discrimination against other groups" did not justify amendment permitting sexual orientation discrimination).

There is a second problem with the procreation rationale. As other courts have noted, an argument relying on procreation raises an obvious question: if the reason same-sex couples cannot marry is that they cannot procreate, then why are opposite-sex couples who cannot or will not procreate allowed to marry? *E.g., Baskin*, 2014 WL 1568884, at *3; *De Leon*, 975 F.Supp.2d at 655. Wisconsin law does not restrict the marriages of opposite-sex couples who are sterile or beyond the age of procreation and it does not require marriage applicants to make a "procreation promise" in exchange for a license.

Defendants do not address this problem, but amici offer two responses. First, amici say that "it would be difficult (if not impossible), and certainly inappropriately intrusive, to determine ahead of time which couples are fertile." Amici Br., dkt. # 109, at 12. Second, they quote *Morrison*, 821 N.E.2d at 27, for the proposition that a "reasonable legislative classifi-

cation is not to be condemned merely because it is not framed with such mathematical nicety as to include all within the reason of the classification and to exclude all others." *Id.* at 13. *See also Baker,* 191 N.W.2d at 187 (making same arguments); *Adams,* 486 F.Supp. at 1124–25 (same).

Neither argument is persuasive. First, amici's argument that it would be "difficult (if not impossible)" to attempt to determine a couple's ability or willingness to procreate is simply inaccurate. Amici identify no reason that the state could not require applicants for a marriage license to certify that they have the intent to procreate and are not aware of any impediments to their doing so. In fact, Wisconsin already *does* inquire into the fertility of some marriage applicants, though in that case it requires the couple to certify that they are *not* able to procreate, which itself is proof that Wisconsin sees value in marriages that do not produce children and is applying a double standard to same-sex couples. Wis. Stat. § 765.03(1) (permitting first cousins to marry if "the female has attained the age of 55 years or where either party, at the time of application for a marriage license, submits an affidavit signed by a physician stating either party is permanently sterile"). To the extent amici mean to argue that an inquiry into fertility would be inappropriately intrusive because opposite-sex married couples have a constitutional right *not* to procreate under *Griswold,* that argument supports a view that the same right must be extended to same-sex couples as well. *Cf. Eisenstadt,* 405 U.S. at 453 (denying access to contraception on basis of marital status violates equal protection clause).

***37** Like defendants' argument regarding "responsible procreation," amici's alternative argument that "mathematical certainty is not required" is contingent on a rational basis review, which I have rejected. Further, this rationale is suspicious not just because Wisconsin has failed to ban infertile couples from marrying or to require intrusive tests to get a marriage license. Rather, it is suspicious because neither defendants nor amici cite any instances in which Wisconsin has ever taken *any* legal action to discourage infertile couples from marrying. There is also little to no stigma attached to childless married couples. Neither defendants nor amici point to any social opprobrium directed at the many millions of such couples throughout this country's history, beginning with America's first family, George and Martha Washington, who had no biological children of their own. http:// en.wikipedia.org/wiki/George Washington (visited June 6, 2014). The lack of any attempts by the state to dissuade infertile persons from marriage is proof that marriage is about *many* things, including love, companionship, sexual intimacy, commitment, responsibility, stability *and* procreation and that Wisconsin respects the decisions of its heterosexual citizens to determine for themselves how to define their marriage. If Wisconsin gives opposite-sex couples that autonomy, it must do the same for same-sex couples.

C. *Optimal Child Rearing*

Defendants argue that "[s]ocial science data suggests that traditional marriage is optimal for families." Dfts.' Br., dkt. # 102, at 52 (citing articles). Amici make a similar argument that the state has a valid interest in encouraging "the rearing of children by a mother and father in a family unit once they are born." Amici Br., dkt. # 109, at 13. *See also Kandu,* 315 B.R. at 146 ("[T]he promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern.").

This argument harkens back to objections to interracial marriage made by the state in *Loving.* Brief for Respondents at 47–52, *Loving v. Virginia,* 388 U.S. 1 (1967), 1967 WL 113931 ("Inasmuch as we have already noted the higher rate of divorce among the intermarried, is it not proper to ask, 'Shall we then add to the number of children who become the victims of their intermarried parents?' "). Further, it seems to

be inconsistent with defendants' previous argument. On one hand, defendants argue that same-sex couples do not need marriage because they can raise children responsibly without it. On the other hand, defendants argue that same-sex couples should not be raising children at all.

The substance of defendants' and amici's argument has been seriously questioned by both experts and courts. *E.g.*, *Golinski.*, 824 F.Supp.2d at 991 (citing evidence that "it is 'beyond scientific dispute' that same-sex parents are equally capable at parenting as opposite-sex parents"); *Perry*, 704 F.Supp.2d at 1000 ("The evidence does not support a finding that California has an interest in preferring opposite-sex parents over same-sex parents. Indeed, the evidence shows beyond any doubt that parents' genders are irrelevant to children's developmental outcomes ."); Charlotte Patterson, Children of Lesbian and Gay Parents: Summary of Research Findings, cited in *Same–Sex Marriage: Pro and Co* 240 (Andrew Sullivan ed., Vintage Book 2004) (finding no adverse effects on children of same-sex parents). However, I need not resolve this sociological debate because, even if I assume that children fare better with two biological parents, this argument cannot carry the day for defendants for four reasons.

***38** First, this is another incredibly underinclusive rationale. Defendants point to *no* other restrictions that the state places on marriage in an attempt to optimize outcomes for children. Marriage applicants in Wisconsin do not have to make any showing that they will make good parents or that they have the financial means to raise a child. A felon, an alcoholic or even a person with a history of child abuse may obtain a marriage license. Again, the state's singular focus on banning same-sex marriage as a method of promoting good parenting calls into question the sincerity of this asserted interest. *Romer*, 517 U.S. at 635.

Second, even if being raised by two biological parents provides the "optimal" environment on average, this would not necessarily justify a discriminatory law. Under heightened scrutiny, the government may "not rely on overbroad generalizations about the different talents, capacities, or preferences of" different groups. *Virginia*, 518 U.S. at 533 (state violated equal protection clause by denying women admission to military college, despite evidence that college's "adversative method" was less suitable for women on average).

Third, with or without marriage rights, some same-sex couples will raise children together, as they have been doing for many years. Thus, the most immediate effect that the same-sex marriage ban has on children is to foster less than optimal results for children of same-sex parents by stigmatizing them and depriving them of the benefits that marriage could provide. *Goodridge*, 798 N.E.2d at 963–64 ("Excluding same-sex couples from civil marriage ... prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.") (internal quotations omitted). *Cf. Windsor*, 133 S.Ct. at, 2694 (DOMA "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."). The state's failure to consider the interests of part of the very group it says it means to protect is further evidence of the law's invalidity. *Plyler*, 457 U.S. at 223–24 ("In determining the rationality of [law restricting some children's access to public schools], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.").

Finally, and perhaps most important, defendants do not explain how banning same-sex marriage helps to insure that more children are raised by an opposite-sex couple. I agree with the courts that see no way

that it could. *DeBoer*, 973 F.Supp.2d at 770–71; *De Leon*, 975 F.Supp.2d at 653; *Bourke*, 2014 WL 556729, at *8. Defendants do not suggest that it would be rational to believe that the same-sex marriage ban causes any gay person to abandon his or her sexual orientation and enter an opposite-sex marriage for the purpose of procreating or that, even if the ban had such an effect, the situation would be beneficial for the child in the long run. Although it might be rational to believe that some same-sex couples would forgo raising children without the benefits and protections afforded by marriage, that result would not lead to more children being raised by opposite-sex couples; rather, it simply would mean that fewer children would be born or more would be left unadopted. Not surprisingly, neither defendants nor amici argue that not being born at all or being a ward of the state is preferable to being raised by a same-sex couple. Accordingly, Wisconsin's ban on marriage between same-sex couples cannot be justified on the ground that it furthers optimal results for children.

D. *Protecting the Institution of Marriage*

***39** Both defendants and amici express concerns about the effect that allowing same-sex couples to marry could have on the institution of marriage as a whole. Defendants say that "[r]eshaping social norms about marriage could have harmful effects," such as "shifting the public understanding of marriage away from a largely child-centric institution to an adult-centric institution focused on emotion." Dfts.' Br., dkt. # 102 at 57. They analogize same-sex marriage to no-fault divorce laws, which defendants say led to an increase in divorce rates and generally made marriages "fragile and often unreliable." *Id.* (quoting Sandra Blakeslee, *Unexpected Legacy of Divorce* 297 (New York: Hyperion, 2000)). In addition, defendants quote an article in which the author argues that, if marriage between same-sex couples is legalized, "[t]he confusion of social roles linked with marriage and parenting would be tremendous." *Id.* at 58 (quoting Lynn Wardle, "Multiply and Replenish": Considering Same–Sex Marriage in Light of State Interests in Marital Procreation, 24 Harv. J.L. & Pub. Pol'y 771, 799 (2001)). Amici make a similar argument, stating that allowing same-sex marriage risks "psycho-social inversion of the purpose of marriage from promoting children's interests to promoting adult arrangements in which children are secondary." Amici Br., dkt. # 109, at 8.

As an initial matter, it is not clear whether the Supreme Court would view this interest as even legitimate. In *Windsor*, 133 S.Ct. at 2693, the Court concluded that Congress' stated purpose to "defend" marriage from same-sex couples was evidence that the purpose of DOMA was to "interfer[e] with the equal dignity of same-sex marriages" and therefore improper. Similarly, in *Loving*, 388 U.S. at 8, 11, the Court stated that there was "patently no legitimate overriding purpose" for a ban on interracial marriage despite an argument that "the scientific evidence is substantially in doubt" about the effect that interracial marriage would have on society. Certainly, to the extent that defendants or amici are concerned about the erosion of strict gender roles in marriage, that is a sexist belief that the state has no legitimate interest in furthering. *Virginia*, 518 U .S. at 541.

In addition, this interest suffers from the same problem of underinclusiveness as the other asserted interests. Two strangers of the opposite sex can marry regardless of their intentions, without any demonstration or affirmation of the example they will set, even if they have been previously divorced or have a history of abusing the institution. Similarly, the no-fault divorce rules that defendants cite actually undermine their argument by showing that Wisconsin *already* supports an "adult-centric" notion of marriage to some extent by allowing easy divorce even when the couple has children. Coontz, *supra*, at 274 (excluding same-sex couples from marriage after liberalizing heterosexual marriages and relationships in other ways is "a case of trying to lock the barn door after the horses have already gone").

***40** In any event, neither defendants nor amici cite any evidence or even develop a cogent argument to support their belief that allowing same-sex couples to marry somehow will lead to the de-valuing of children in marriage or have some other adverse effect on the marriages of heterosexual couples. Thus, it is doubtful whether defendants' belief even has a rational basis. *Cf. Doe,* 403 F.Supp. at 1205 (Merhige, J., dissenting) ("To suggest, as defendants do, that the prohibition of homosexual conduct will in some manner encourage new heterosexual marriages and prevent the dissolution of existing ones is unworthy of judicial response. In any event, what we know as men is not forgotten as judges—it is difficult to envision any substantial number of heterosexual marriages being in danger of dissolution because of the private sexual activities of homosexuals.").

Under any amount of heightened scrutiny, this interest undoubtedly fails. The available evidence from other countries and states does not support defendants' and amici's argument. Nussbaum, *supra,* at 145 (states that allow marriage between same-sex couples have lower divorce rates than other states); Gerstmann, *supra,* at 22 (citing findings of economics professor M.V. Lee Badgett that same-sex partnerships in Europe have not led to lower rates of marriage, higher rates of divorce or higher rates of non-marital births as compared to countries that do not offer legal recognition); William N. Eskridge, Jr. and Darren Spedale, *Gay Marriage: For Better or Worse?* 205 (Oxford University Press 2006) (discussing study finding that percentage of children being raised by two parents in Scandinavia increased after registered partnership laws took effect).

E. *Proceeding with Caution*

Defendants say that the "Wisconsin people and their political representatives could rationally choose to wait and analyze the impact that changing marriage laws have had in other states before deviating from the status quo." Dfts.' Br., dkt. # 102, at 46. However, that argument is simply a restatement of defendants' argument that they are concerned about potential adverse effects that marriage between same-sex couples might have, so I need not consider it again. In itself, a desire to make a class of people wait to exercise constitutional rights is not a legitimate interest. *Watson v. Memphis,* 373 U.S. 526, 532–533 (1963) ("The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled."). *See also* Martin Luther King, Jr., Letter from Birmingham Jail ("For years now I have heard the word 'Wait!' It rings in the ear of every Negro with piercing familiarity. This 'Wait' has almost always meant 'Never.' "); Evan Wolfson, *Why Marriage Matters* 121 (Simon & Schuster 2004) (quoting state senator's statement after *Goodridge,* 798 N.E.2d 941) ("*Goodridge* is ahead of our mainstream culture and our own sensibilities [but] my level of comfort is not the appropriate monitor of the Constitutional rights of our citizens. ... [The Constitution] has always required us to reach beyond our moral and emotional grasp.").

F. *Slippery Slope*

***41** Finally, defendants express concern about the legal precedent that allowing same-sex marriage will set. Dfts.' Br., dkt. # 102, at 55 ("Extending the fundamental right to marriage to include same-sex couples could affec[t] other legal restrictions and limitations on marriage."). In other words, if same-sex couples are allowed to marry, then how can prohibitions on polygamy and incest be maintained?

I make three observations in response to defendants' concern about the slippery slope. First, and most important, the task of this court is to address the claim presented and not to engage in speculation about issues not raised that may or may not arise at some later time in another case. *Socha v. Pollard,* 621 F.3d 667, 670 (7th Cir.2010) ("If [an] order represents a mere advisory opinion not addressed to resolving a 'case or controversy,' then it marks an attempted exercise of judicial authority beyond constitutional bounds."). Thus, the important question for this case is not

whether another individual's marriage claim may be analogous to plaintiffs' claim, but whether *plaintiffs'* claim is like the claims raised in cases such as *Loving*, *Zablocki*, *Turner* and *Windsor*. I have concluded that it is. When the Supreme Court struck down the marriage restrictions in those other cases, it did not engage in hypothetical discussions about what might come next. *See also Lewis v. Harris*, 875 A.2d 259, 287–88 (N.J.Super .A.D.2005) (Collester, J., dissenting) ("It is ... unnecessary for us to consider here the question of the constitutional rights of polygamists to marry persons of their choosing.... One issue of fundamental constitutional rights is enough for now.").

Second, there are obvious differences between the justifications for the ban on same-sex marriage and other types of marriage restrictions. For example, polygamy and incest raise concerns about abuse, exploitation and threats to the social safety net. A more fundamental point is that Wisconsin's ban on same-sex marriage is different from other marriage restrictions because it completely excludes gay persons from participating in the institution of marriage in any meaningful sense. In other words, gay persons simply are asking for the right to marry *someone*. With the obvious exception of minors, no other class is being denied this right. As in *Romer*, plaintiffs are not asking for "special rights"; they are asking only for the rights that every adult already has.

Third, opponents of marriage between same-sex couples have been raising concerns about the slippery slope for many years, but these concerns have not proved well-founded. Again, there is no evidence from Europe that lifting the restriction on same-sex marriage has had an effect on other marriage restrictions related to age, consanguinity or number of partners. Eskridge and Spedale, *supra*, at 40. Similarly, in Vermont and Massachusetts, the first states to give legal recognition to same-sex couples, there has been no movement toward polygamy or incest. Further, I am aware of no court that even has questioned the validity of those restrictions. *Marriage Cases*, 183 P.3d at 434 n.52 (rejecting comparison to polygamy and incest); *Goodridge*, 798 N.E.2d at 969 n.34 (2003) (same). Accordingly, this interest, like all the others asserted by defendants and amici, does not provide a legitimate basis for discriminating against same-sex couples.

CONCLUSION

***42** In 1954, in what likely was one of the first cases explicitly addressing issues involving gay persons, a federal district court denied a claim involving censorship of a gay news magazine, stating that the court "rejected" the "suggestion that homosexuals should be recognized as a segment of our people." Joyce Murdoch and Deb Price, *Courting Justice* 33 (Basic Books 2002) (quoting unpublished decision in *ONE, Inc. v. Oleson).* In the decades that followed, both courts and the public began to better appreciate that the guarantees of liberty and equality in the Constitution should not be denied because of an individual's sexual orientation. Despite these advances, marriage equality for same-sex couples remained elusive. Court rulings in favor of same-sex couples were rare and, even when achieved, they tended to generate strong backlash. Klarman, *supra*, at 58, 113 (noting that, after decision favorable to same-sex marriage in *Baehr*, 852 P.2d 44, Congress enacted Defense of Marriage Act and many states passed similar laws; in 2004, after *Goodridge*, 798 N.E.2d 941, eleven states passed constitutional amendments banning marriage between same-sex couples).

In my view, that initial resistance is not proof of the lack of merit of those couples' claims. Rather, it is evidence of Justice Cardozo's statement (quoted by Justice Ginsburg during her confirmation hearing) that "[j]ustice is not to be taken by storm. She is to be wooed by slow advances." Editorial, "Ginsburg's Thoughtful Caution," Chicago Tribune (July 22, 1993), *available at* 1993 WLNR 4096678. It took the Supreme Court nearly a century after the Fourteenth Amendment was enacted to hold that racial segregation violates the Constitution, a view that seems ob-

vious today. It took another 12 years for the Court to strike down anti-miscegenation laws. (Although the Court had the opportunity to review Virginia's anti-miscegenation law shortly after *Brown*, the Court declined to do so at the time, *Naim v. Naim*, 350 U.S. 985 (1956) (dismissing appeal), leading some to speculate that the Court believed that the issue was still too controversial. Eskridge and Spedale, *supra*, at 235.) It took longer still for courts to begin to remedy the country's "long and unfortunate history of sex discrimination." *Frontiero*, 411 U.S. at 684.

In light of *Windsor* and the many decisions that have invalidated restrictions on same-sex marriage since *Windsor*, it appears that courts are moving toward a consensus that it is time to embrace full legal equality for gay and lesbian citizens. Perhaps it is no coincidence that these decisions are coming at a time when public opinion is moving quickly in the direction of support for same-sex marriage. *Compare* Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?* 95 Mich. L.Rev. 1578, 1585 (1997) ("Public opinion may change ... but at present it is too firmly against same-sex marriage for the courts to act."), *with* Richard A. Posner, "Homosexual Marriage—Posner," The Becker–Posner Blog (May 13, 2012) ("[T]he only remaining basis for opposition to homosexual marriage ... is religious.... But whatever the [religious objections are], the United States is not a theocracy and should hesitate to enact laws that serve religious rather than pragmatic secular aims.").

***43** Citing these changing public attitudes, defendants seem to suggest that this case is not necessary because a majority of Wisconsin citizens will soon favor same-sex marriage, if they do not already. Dfts.' Br., dkt. # 102, at 40 (citing article by Nate Silver predicting that 64% of Wisconsinites will favor same-sex marriage by 2020). Perhaps it is true that the Wisconsin legislature and voters would choose to repeal the marriage amendment and amend the statutory marriage laws to be inclusive of same-sex couples at some point in the future. Perhaps it is also true that, if the courts had refused to act in the 1950s and 1960s, eventually all states would have voted to end segregation and repeal anti-miscegenation laws. Regardless, a district court may not abstain from deciding a case because of a possibility that the issues raised in the case could be resolved in some other way at some other time. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976) (federal courts have "virtually unflagging obligation" to exercise jurisdiction in cases properly before them).

It is well-established that "the Constitution protects persons, not groups," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), so regardless of possible future events affecting the larger community, my task under federal law is to decide the claims presented by the plaintiffs in this case *now*, applying the provisions in the Fourteenth Amendment as interpreted by the Supreme Court in cases such as *Loving*, *Romer*, *Lawrence* and *Windsor*. Because my review of that law convinces me that plaintiffs are entitled to the same treatment as any heterosexual couple, I conclude that the Wisconsin laws banning marriage between same-sex couples are unconstitutional.

ORDER

IT IS ORDERED that

1. The motion to dismiss filed by defendants Scott Walker, J.B. Van Hollen and Oskar Anderson, dkt. # 66, is DENIED.

2. The motion for summary judgment filed by plaintiffs Virginia Wolf, Carol Schumacher, Kami Young, Karina Willes, Roy Badger, Garth Wangemann, Charvonne Kemp, Marie Carlson, Judith Trampf, Katharina Heyning, Salud Garcia, Pamela Kleiss, William Hurtubise, Leslie Palmer, Johannes Wallmann and Keith Borden, dkt. # 70 is GRANTED.

3. It is DECLARED that art. XIII, § 13 of the Wisconsin Constitution violates plaintiffs' fundamental right to marry and their right to equal protection of laws under the Fourteenth Amendment to the United States Constitution. Any Wisconsin statutory provisions, including those in Wisconsin Statutes chapter 765, that limit marriages to a "husband" and a "wife," are unconstitutional as applied to same-sex couples.

4. Plaintiffs may have until June 16, 2014, to submit a proposed injunction that complies with the requirement in Fed.R.Civ.P. 65(d)(1)(C) to "describe in reasonable detail ... the act or acts restrained or required." In particular, plaintiffs should identify what they want *each* named defendant to do or be enjoined from doing. Defendants may have one week from the date plaintiffs file their proposed injunction to file an opposition. If defendants file an opposition, plaintiffs may have one week from that date to file a reply in support of their proposed injunction.

***44** 5. I will address defendants' pending motion to stay the injunction after the parties have had an opportunity to file materials related to the proposed injunction. If the parties wish, they may have until June 16, 2014, to supplement their materials related to that motion in light of the Supreme Court's decision in *Geiger v. Kitzhaber* not to grant a stay in that case.

W.D.Wis.,2014.
Wolf v. Walker
--- F.Supp.2d ----, 2014 WL 2558444 (W.D.Wis.)

END OF DOCUMENT